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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent

DUNCAN COFFEE COMPANY'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by Duncan Coffee Company for this court's writ of certiorari to review a judgment and opinion of the United States Emergency Court of Appeals rendered in this cause on the 16th day of December, 1949.

Jurisdiction

The jurisdiction of this court to review the questions herein presented is invoked under paragraph (d) of Section

924 of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. 901 et seq.) providing that petition for certiorari may be filed in this court within thirty days after entry of judgment by the Emergency Court of Appeals. The judgment of the United States Emergency Court of Appeals became final on the 16th day of December, 1949.

The 30 days time for filing this petition and brief in support thereof as provided by the aforesaid Act (Section 924 (d)) expires Sunday, January 15, 1950.

Summary and Statement

The court below held that the order of the respondent interpreting its coffee import subsidy contract with petitioner under the provisions of the said Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. 901 et. seq.) so as to withhold $79,059.36 from subsidies earned by the petitioner by its actual importations of coffee and its reasonable and lawful expenditure of an equal sum therein, under said contract, was valid and in accordance with the purposes and intent of the said Act and that said contract constituted the mutual agreement and intent of the parties therefor, and was not discriminatory, notwithstanding the uncontradicted evidence and the admissions of the respondent clearly showing that the particular coffees by reason of which such earned subsidy was withheld were coffees which had not been imported by petitioner as the Importer engaged in the importation thereof, the petitioner received no subsidy thereon as the Importer thereof, and such coffees had been lawfully acquired by petitioner from domestic sources of supply in the continued exercise of petitioner's traditional established coffee Roaster industry practices and status as a coffee Roaster equally, alike, competitive and identical in all things with all of the 1,000 other coffee Roasters as such. The apparent basis for the court's holding was that the language of the contract constituted

petitioner's mutual consent to such withholding and that while such withholding might not have been upheld if such language had been that of a regulation under the identical Act, nevertheless, being the language of a contract it was bound to construe the same without regard to what the intent of said language under said Act would have been when used in a regulation. The court further indicated that a heavier burden fell upon the petitioner traditionally engaged in identical practices as the 1,000 other coffee Roasters because such practices were integrated with the separate and different practices of the green coffee Importer, and that there was apparently no relief under the said Act available to petitioner from such discrimination against its competitive Roaster functions and consequence.

Questions Presented

1. Is it the intent and purpose of the Emergency Price Control Act to interpret the terms "the Importer" and "the Importer's inventory" harmoniously with the coffee Roaster industry established practices and traditional industry understanding as reflected by the uncontradicted evidence and by respondent's admissions, when such terms are used in a governmental agency regulation under the Emergency Price Control Act, and to interpret the identical terms so as to conflict with the coffee Roaster industry established traditional practices and industry understanding and such evidence and admissions, resulting in a burden to the coffee Roaster as such not previously characteristic of the industry, when such terms are used in a governmental agency contract under the identical Act, and thereby subjecting some of the 1,000 competitive coffee Roasters as such of the United States and their economically and mechanically identical non-imported, non-subsidy inventories to such burden contrary to established distribution practices?

2. Was there "a mutual meeting of the minds" that the terms "the Importer" and "the Importer's inventory" as used in this contract were intended to fix a burden upon petitioner's continued exercise of the traditional coffee industry practices as a Roaster equally, alike and competitive with all other Roasters as such, solely because of petitioner's performance of the equally traditional but separate and different Importer's functions as such, under this contract?

3. The restoration and stabilizing of normal economy and distribution being an essential purpose of the said Emergency Price Control Act, is it contrary to the purposes and intent of said Act and particularly Section 902 (h), to interpret this contract under said Act for subsidies upon importations accomplished thereunder, without a prior affirmative finding of necessity, and to totally disregard the uncontradicted evidence establishing the traditional practices and industry understanding to be contrary to such interpretation, so as to compel changes in the established industry practices of petitioner as a coffee Roaster and to fix a novel burden upon some of such coffee Roasters including the petitioner, when it is admitted that such established practices of all Roasters alike constitute the vital normal distribution of green coffee and without which practice normal distribution could not exist, and when it is admitted that all coffee Roasters are mechanically, economically, equal, alike and competitive and dependent upon their sales of Roasted coffees as such, regardless of whether any such Roaster did or did not exercise to a greater or lesser extent also the additional and different Importer functions equally and alike with all Importers as such?

4. The restoration and stabilizing of normal distribution and economy being an essential purpose of the law out of which this contract and importing program arise, and Section 902 (h) of the Emergency Price Control Act for-

bidding changes in the established coffee industry practices and distribution (without affirmative finding of necessity), and it being admitted that the practice of petitioner as a Roaster by which it acquired its Roaster inventory against which this withholding is assessed was not consequent of any Importer function but was instead the traditional practice of all Roasters as such, and it being admitted that without such practices of all Roasters as such the normal distribution of green coffee could not exist, and there being no finding of affirmative necessity for such burden, is it valid to interpret this contract under the Act so as to impede and burden the restoration and stabilizing of such normal distribution respecting coffee Roasters whose functions are dual and by an integrated management including petitioner, when such inventory is accumulated solely by the exercise of such traditional coffee Roaster industry practices of all Roasters without regard to integration, obtaining such identical inventories from domestic sources and not by the exercise of any Importer function or practice, and to do so when regulations as such under the identical Act, are judicially interpreted and determined contrarily?

5. Is it lawful under the Emergency Price Control Act to interpret a contract for subsidies upon importations of green coffee so that the effect upon all Importers as such is equal and alike but the effect upon the inventory and established practices and distribution of all Roasters as such including petitioner is unequal and discriminatory against petitioner as a coffee Roaster solely because petitioner exercised and did not change the traditional established coffee Roaster practices as such during the period while it was also exercising the traditional functions of a coffee Importer under this coffee Importer contract?

6. Was it intended under the Emergency Price Control Act out of which this contract arises, that the terms "the

Importer'' and ''the Importer's inventory'' should be interpreted contrary to the traditional understanding and established practice of the industry and contrary to the interpretation of regulations arising under the identical Act, and contrary to the distinction between the coffee Roaster as such and the Importer as such as is reflected by War Food Order 146 (11 F.R. 3785), so as to fix a burden not characteristic of the industry upon such inventories of some coffee Roasters as such merely because such traditional practices are integrated under a singular management with the established practices of a coffee Importer, when the uncontradicted evidence and the admitted facts show that identical industry practices and substantial inventories of more than 688 other coffee Roasters economically, mechanically and competitively identical in all things with petitioner whose Roaster practices were not integrated with Importer practices, remained free at all times to engage in such identical established industry practices wholly free of such burden?

The Reasons Relied On for the Allowance of the Writ

1. Petitioner does not believe it to be the purposes or intent of this Act that its effects should be in keeping with the established coffee industry traditional practices and understanding of the significance of the terms ''the Importer'' and ''the Importer's inventory'' where a regulation is involved and something entirely different and contrary where a contract arising under the identical Act is involved. The Act itself makes no such distinction, and does not provide for any waiver or abandonment of any of its provisions merely because its intent and purposes are sought to be accomplished by contract rather than regulation. If the contract is to be valid under the Act it should be interpreted in accord with the identical intent and purposes of the Act as in the regulations thereunder.

2. The subsidy contract is not in the usual commercial everyday contract atmosphere of the coffee industry. It arises from unusual conditions which are transitory as is the law itself from which it derives its existence. These conditions gave rise to certain stated purposes and desires of the government and it was not contemplated that either such conditions or the means of overcoming the undesired effects thereof were to become permanent or to constitute the usual atmosphere of contract between the parties. But this contract related directly to the coffee industry and its established practices which were traditional and it used the terms "the Importer" and "the Importer's inventory" which were traditional to and of established significance in that industry. Can the governmental agency indirectly by mere interpretation change the significance of terms traditional to the coffee industry by the mere medium of contract having a temporary objective, and which terms have a different significance when used in a directly related governmental agency regulation, when both the contract and the regulation depend for their validity upon the purposes and intent of the identical Act and such Act provides no distinction between contract and regulation?

3. Because the respondent prepared this contract and knew or should have known that the terms which it used therein relating to the coffee industry were terms having a fixed significance within that industry and knowing that the purposes of the contract were purposes similar to and traditionally engaged in by the coffee industry, the petitioner feels that such terms should not be given a significance contrary to the actual functions, purposes and economic consequence which are traditionally established and understood in the coffee industry, and especially so, when such contrary significance causes economic discrimination against petitioner and adds a burden to the established tra-

ditional distribution and cost practices of the industry which has never before existed. Petitioner feels that it can rely upon the fact that the underlying purposes and intent of the Act out of which this contract arose are to restore and stabilize NORMAL traditional industry distribution practices, and that Section 902 (h) of the Act forbidding changes in the coffee industry established distribution practices directly supported such underlying purposes and intent.

4. As a coffee Roaster engaged in such practices for more than 30 years petitioner is economically and competitively admitted to be identical with all of the 1,000 coffee Roasters in the United States. Petitioner does not believe it to have been the purpose and intent of the Act to countenance interpretation whether of a contract or a regulation, arising by the authority of the Act, so as to result in substantial discrimination against any class or segment of industry in respect of its normal and established distribution practices or cost practices. Yet, there were only 312 coffee Importing contracts with coffee Importers as such, as compared to more than 1,000 coffee Roasters as such, who admittedly had on hand substantial inventories identical with the petitioners. While the interpretation of the court below has the effect of treating equally and alike all Importers of coffee under this contract regardless of whether any Importer did or did not perform any Roaster function, such interpretation works a drastic economic and competitive handicap upon all Roasters including the petitioner who exercised the separate and different functions of an Importer as such.

5. The coffee industry has traditionally included those such as petitioner, exercising dual functions and capacities of both the coffee Roaster as such and the coffee Importer as such. The industry also includes Roasters who exercise

no Importing functions and capacity, and Importers who exercise no Roaster functions.

6. Petitioner further relies upon the fact that the Act recognizes that the normal economy which it sought to restore and stabilize was traditionally a competitive economy within all established segments of the coffee industry, including the Roasters, the Importers and those enterprises which are competitive in dual capacities. Therefore, it is inconceivable that this Act intended to restore and stabilize normal competitive economy and at the same time intended to place a burden upon the established economic and competitive practices of a coffee Roaster unequally and unlike all other coffee Roasters as such, merely because he has traditionally and continues to engage in the separate and different capacity as a competitive coffee Importer equally and alike with all coffee Importers as such, without regard to whether such result is accomplished by the interpretation of a contract.

7. Petitioner relies also upon the fact that in an unusual and admittedly transitory atmosphere of conditions and circumstances such as that out of which this contract arose, wherein governmental agencies are involved in more or less closely related objectives, the petitioner is entitled to look not only to the established traditions, practices and significance of terms regularly and specifically relating to petitioner's industry, but he is entitled also to look to the attitude and expressions including interpretation of such governmental agencies in similar situations. In the meat subsidy program by regulation the governmental agency provided for what was called an "ownership and control" clause, which put those in the meat industry who exercised dual capacities, upon absolute notice that such integration of functions and activities would deprive them of subsidies. There was no such clearly stated penalty or hazard included

in the coffee Importer subsidy program or contract. War Food Order 146 (11 F.R. 3785) recognized the distinction between and provided for quantity controls in respect of the inventories of Importers as such and of Roasters as such without regard to the existence or non-existence of dual capacities or functions. The court below has expressly held in interpreting a regulation under this identical Act (Booth Fisheries Corporation, 153 F. 2d 449) that a single integrated enterprise being engaged in multiple capacities was not prejudiced thereby in respect of a price regulation; it likewise held in the case of *Electromatic Distributors* vs. *Clark,* 162 F. 2d 212, that a radio manufacturer could not be prejudiced as a manufacturer by a price regulation fixed for manufacturers, on radio sets which he did not manufacture but which he imported instead. There is a striking analogy between the mechanical and economic realities of these two cases to the case at bar. Supporting this reasoning is the further obvious fact that while subsidies in this atmosphere of unusual and transitory conditions had been handled by regulation in respect of many different commodities with which the economy was concerned, the coffee subsidy program was the first and only subsidy program of its kind which was generally handled through the means of contract. Therefore, it is not unreasonable to expect that the coffee industry would be dealt with not unlike the interpretations respecting regulations, since there was no clear contrary precedent or judicial determination available. It was reasonable for the coffee industry to rely upon the interpretations of regulations dealing with the same subject matter arising under the identical authority of law and being a part of the economic stabilization and recovery effort, and those in the coffee industry had a right to feel that their participation in such effort and stabilization program would cause their contracts to be interpreted not unfairly and in the light of their established practices and the industry

significance of the terms descriptive of their various traditional functional segments.

8. For further reason upon which petitioner relies, it is common knowledge that of those engaged in the coffee industry many are deficient in the refinements and intricacies sometimes attending judicial determination of what may or may not be ambiguity. Petitioner feels that for the terms "the Importer" and "the Importer's inventory" to be interpreted contrary to the uncontradicted evidence of the established practices and understanding of the industry in this unusual and emergency atmosphere in the case of a contract, while such interpretation is harmonious with such industry practices and understanding in the case of a regulation arising from the identical atmosphere, legislation and conditions, is nothing if not ambiguous, and especially so when there is available for guidance only the interpretation of the regulations as such and the traditional industry significance of the terms. It is obvious to all reasonable minds that the functions, practices and consequent inventory of the coffee Roasters as such is not and cannot be the same in fact or in economic reality or competitive enterprise as the Importer's functions and consequent inventory. Petitioner and the other coffee Roasters who also import are entitled to know with certainty whether they are to be burdened by reason of factual reality, or by fanciful distinctions found in the judicial reasoning of the court below.

9. Finally, if lawful and traditional integration of two separate and different functional activities and the economic consequence of each are to necessitate burden upon the coffees acquired by the Roaster in a traditional Roaster function in established distribution practices from domestic sources of supply, because such Roaster functions are integrated under a single management with the Importer func-

tions in acquiring coffee from foreign sources of supply, in the interpretation of a contract but not in the case of a regulation, both arising from the same law, then the coffee Roasters ought to be clearly informed, that their competitive and economic judgment and arrangements can be governed accordingly. For in such a state of affairs the economy of the coffee industry is wholly subject to the attitude of the interpreter which becomes the law, and there is no comfort in the law as written or in the established traditional industry practices and reality which the law then so jestingly protects.

10. Where the dominant purpose of the law is to restore and stabilize normal distribution, and the dominant purpose of the contract in the stabilization atmosphere, is to aid and encourage importing of coffee, and the contract is highly vocal as to the Importer practices as such, but is wholly silent as to the coffee Roaster's known, established practices as such, and the practices of each are different, but both are vital to normal traditional established distribution with which the law out of which the contract arises is concerned, the contract ought not to be interpreted so as to burden the Roaster practices unequally and unlike as to all Roasters as such, while it burdens equally and alike all Importers as such, merely because the industry includes some Roasters as such who are integrated under a single management with the Importer practices as such, and because the burden arises from contract under the identical law rather than under a regulation (both being authorized but not distinguished by this law), when the distribution, economic practices and purposes and dependency of all Roasters as such are identical and such practices do not include importing. Burden and discrimination among those engaged in identical economic established practices and having identical economic dependency as such, should occur,

if at all, only when plainly required, and by affirmative finding of necessity, and never by inference or innuendo.

11. It has been suggested that paragraph 14 (c) of the contract would be meaningless if the Roaster's practice as such were not burdened when integrated with the Importer practice. This is not necessarily correct. For the contract provides for certain forfeiture of subsidy by the Importer as such. It could mean that if the Importer's inventory included coffee on which his claim for subsidy had been denied or forfeited, and the Importer had thereby not received as much subsidy as he had coffee in inventory, he the Importer would not be required to pay or repay to R.F.C. a greater sum than he had been paid (reimbursed) by R.F.C. Certainly its meaning is not so clearly set out as an original burden upon the Roaster distribution practice as to be the equivalent of the "ownership and control" clause of other subsidies by regulation, or to include the Roaster practices in the purview of the contract. Should a contract under the same law be less clear than a regulation?

Conclusion

WHEREFORE, petitioner prays that this writ of certiorari be granted, and that this court's writ of certiorari issue to the United States Emergency Court of Appeals for the purpose of reviewing the questions hereinabove set out.

SAMUEL H. PEAK,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

The official report of the opinion of the United States Emergency Court of Appeals, the court below, is not yet available. It is found in the Record filed herein at pages 167-176 incl.

Jurisdiction

Jurisdiction of this Court is invoked under Section 924 (d) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. 924 (d)) providing that within 30 days after the entry of a judgment by the Emergency Court of Appeals, a petition for writ of certiorari may be filed in the Supreme Court of the United States.

Statement of the Case, Containing All Facts Which Should Be Known in Order to Determine the Controversy

1

Under the Emergency Price Control Act of 1942 as amended (50 U. S. C. A., App. 901, et seq.), on the 23rd of

November 1945 the Stabilization Administrator issued Directive 87 (10 F. R. 14450) (R. 4), under the caption "Imports of Green Coffee". It declared a critical need for encouraging imports of green coffee and found necessity for subsidizing imports of green coffee; authorized and directed respondent to establish and carry out a program with respect to imports of green coffee. Thereafter as of November 19, 1945 complainant and respondent accordingly entered into their original contract (R. 41), which was first amended March 19, 1946 (R. 49) and finally amended May 7, 1946 (R. 50).

2

At all times complainant was lawfully qualified under the requirements of the contract as the Importer being engaged in the importation of coffee (R. 41). At all times complainant was traditionally and remains, a coffee Roaster economically identical equally and alike, with all other Roasters as such. Likewise at all times complainant was traditionally and remains, a coffee Importer as such identical, equally and alike, with all coffee Importers (R. 129 & 136).

3

At all times there existed in the coffee industry of the United States those exercising the traditional status and functions exclusively of the Importer as such; those exercising the traditional status and functions exclusively of the Roaster as such, and, those exercising the traditional status and functions of both the Importer and the Roaster. At all times the traditional established industry practices of all Importers as such, and of all Roasters as such, without regard to whether the exercise of such status, functions or practices were integrated or singular and exclusive, were well known to the coffee industry and were, in each respec-

tive status and function as such, economically competitive, equal, alike and identical. At all times it was lawful to continue the exercise of each, either or all of the aforementioned traditional established industry statuses, functions and practices, and complainant did so at all times (R. 119 & 135).

4

The term "the Importer" and the term "the Roaster" are not and have never been synonymous in the coffee industry. In the coffee industry the practice of the Roaster in acquiring green coffee from domestic sources of supply including other Roasters and Importers is not and has never been known, understood or referred to as being the same as "importation of green coffee" or importing. In the coffee industry the term "the Importer" does not and has never meant, identified, signified nor implied the acquisition of green coffee from any domestic source of supply but has always meant, identified and signified the singular activity of actual importation and the specific coffee actually imported consequent of such activity. In the coffee industry all contracts and transactions relating to green coffee are and have always been commonly known, used and interpreted in all things in full accord with the above and foregoing distinctions (R. 14).

5

During the green coffee import subsidy period there were a maximum of 312 import subsidy contracts while there were more than 1,000 established Roasters as such (R. 5, 128, 136). The normal established traditional flow of coffee distribution in the United States is from the foreign countries to the Importer; from the Importer to the Roaster; from the Roaster after processing as such, into Consumer trade outlets (R. 130 & 136). Under this contract and amendments the

Roaster as such, could not claim or lawfully receive this subsidy (R. 42).

6

At the terminal point of the coffee import subsidy contract complainant repaid to respondent $110,135.28 being equivalent to its earned 3¢ per pound import subsidy, on account of green coffee remaining in its inventory which it had imported as the Importer engaged in the importation thereof, and of which no complaint is made. At the same time respondent withheld from valid pending claims of complainant the further sum of $79,059.36 on account of coffee then in its inventory as follows (at 3¢ per pound): $11,811.36 on account of coffee acquired by complainant in the traditional exercise of its Roaster status and functions as distinguished from its Importer status and functions, prior to the inception of the program or contract; plus $67,248.00 on account of coffee then in its inventory which complainant had lawfully acquired from the inception date of the contract to the terminal date thereof, in the exercise of its traditional Roaster industry status and functions as such, and of which complainant had not engaged in importation. Included in the said $67,248.00, the sum of $44,466.84 is represented by such Roaster status coffee so acquired prior to the first amendment, and $55,678.20 is represented by such coffee so acquired in complainant's exercise of its Roaster status and functions as such, prior to the final amendments (R. 124 & 136). In order to accomplish lawful importation under the contract and as amended it was reasonable and necessary for complainant to first expend a sum equal to the 3¢ per pound subsidy (R. 132 & 137).

7

Respondent asserts that by virtue of the provisions of Paragraph 14 of the amended contract (R. 134), it is law-

fully entitled, mutually intended and agreed, to withhold prospectively and retrospectively the said total sum of $79,059.36 as is herein sued for by complainant.

8

At all times pertinent all government controls and regulations including WFO-146 (11 F. R. 3785), applicable to the Roaster industry were in all respects applicable equally and alike, to all the 1,000 established Roasters as such, and all Importer controls were applicable to all the Importers as such, without regard to whether any Roaster did or did not have or exercise any Importer status and functions and vice versa (R. 128, 129 & 130), until respondent came to interpret its green coffee import subsidy contract as amended.

9

Complainant did not knowingly understand, consent or agree that the intent, purpose or effect of its performance of its R. F. C. import contract equally and upon the same basis as all other Importers as such, was intended to prejudice complainant's equally lawful and traditional Roaster practice as such, unequally and to complainant's disadvantage in comparison with all other Roasters as such engaging in the identical industry practices and economically competitive with complainant (R. 13).

10

All the Roaster industry practices (economic and mechanical functions), of the complainant at all times herein and for some 30 years prior were in all things identical to the traditional practices of all other Roasters. The only difference between the practices of all other Roasters and the practices of the complainant in this case is the mere matter of degree or extent. Complainant indulges in such practices by which its Roaster class of inventory is obtained only to a lesser extent than do those Roasters who procure

all of their coffee as a result of such practices. The recapture prejudice complained of in this case is confined to complainant's Roaster class of inventory identical in all things as to all Roasters as such. It is not disputed that as to the Roaster status concerned in this case complainant is and has always been a Roaster exactly as, identical and economically competitive with all Roasters (R. 120, 121, 128, 132 & 136).

11

The lawful continuation without recapture prejudice of the established industry practice of all Roasters in acquiring all or a part of their green coffee from Importers in the same manner as they had traditionally done prior to this coffee import program would not tend to defeat the purpose of the program, but would tend to restore and stabilize the normal economy and flow of distribution and the normal building up of green coffee inventories in the United States. Such practice was not forbidden but was lawfully permitted to all Roasters alike under the terms of W. F. O. 146 and in all other respects, regardless of whether any Roaster did or did not import or did or did not have an R. F. C. import subsidy contract (R. 8 & 128).

12

In the coffee industry the term, "types of coffee" has traditionally meant and still refers to the characteristics of the particular coffee beans, such as, hard, soft, mild, earthy, acidity, etc. It customarily relates to the place of origin or growth, for such coffees naturally have certain inherently known characteristics as distinguished from coffees grown in other localities (R. 15, 123 & 136).

13

The inevitable effect of respondent's interpretation and withholding as herein complained of, places a burden

(prospective and retrospective) of 3¢ per pound ($79,059.36) upon complainant's lawful Roaster industry status, practices and functions as such, which are and were traditionally competitive, economically identical, equal and alike with all other Roasters as such and which burden is not equal and alike with, at least 688 other Roasters as such who had at all times pertinent a substantial quantity of identical Roaster class of inventory, acquired, used and sold in all things at and under identical times, circumstances, controls and economically competitive with complainant (R. 121 & 130). This unequality had never before existed in the coffee industry and is contrary to the traditional practices of the industry.

14

Complainant asserts, that it did not prospectively or retrospectively, mutually agree or intend, and it was not the intent of the program or contract, and it was contrary to the established industry practices, and the law, and unnecessary to the accomplishment of the purposes of the contract to prejudice its lawful continued exercise of its traditional Roaster industry status, functions and practices as such equally and alike with all Roasters; that such withholding by respondent gives the contract an unlawful, discriminatory, invalid and unintended purpose and effect.

15

There is no charge or question of any violation by complainant.

Summary of the Argument

(A) Respondent's interpretation of the contract and its withholding of $79,059.36 earned by petitioner's performance thereunder is prospectively and retrospectively contrary to the intent and provisions of this Import program

and of law, particularly the Emergency Price Control Act of 1942 as amended, and Section 902 (h) thereof (50 U. S. C. A. App. 902 (h)).

(B) Respondent's interpretation of this import contract and withholding $79,059.36 of earnings thereunder, is prospectively and retrospectively contrary to the terms, provisions, intent and purposes of the contract and to the mutual intent, understanding and consent of the parties.

(C) Respondent's interpretation of this green coffee import contract is unlawful and causes the same to be invalid because it is unnecessarily arbitrary, capricious, unreasonable and unfairly and substantially discriminatory prospectively and retrospectively, against the traditional competitive Roaster industry status, functions and practices as such.

Argument under Summary (A)

1

The basic purposes and intent of this coffee import subsidy program, and of law, are found in the tenor of the language employed and in the common sense effect thereof in the light of the inherent nature and attributes of the undertaking and the established industry practices deliberately employed to accomplish the purposes.

2

PURPOSES OF THE PROGRAM

The tenor of the language employed in Directive 87 (10 F. R. 14450) amply describes the dominant purposes:

> "The OPA, the State Department and the Department of Agriculture have submitted information to me with respect to the critical need for encouraging imports of green coffee." "* * * it is necessary to provide

a program for subsidizing imports of green coffee * * *."

"Accordingly, (primary authority) it is hereby ordered:"

"1. The R. F. C. is authorized and directed to establish and carry out the following subsidy program with respect to imports of green coffee:"

"(a) The amount of the subsidy shall be 3¢ per pound * * * of green coffee imported in accordance with the eligibility provisions of this directive."

"1. (c) The Secretary of Agriculture shall establish a quota for each importer * * * proportionate to the importer's allocation as established under WFO 63 * * * "

3

From the foregoing and from the remainder of the directive, it is clear that the dominant purpose described exclusively the status, functions and practices of the Importer as such, and the coffee acquired by the Importers' having engaged in the importation thereof. It was made equally clear that the Directive had no applicability to the established traditional Roaster industry practice of acquiring coffee from Importers thereof.

4

Since traditionally the established practices of the Roaster as such did not include acquisition of coffee from other than domestic sources of supply, it is obvious that the traditional Roaster status, functions and practices as such, were neither within the purview, nor in anywise limited, burdened, changed or otherwise affected by this program. The above intent, purpose and purview of the program is further confirmed by the fact that (1) it was commonly known that the Roaster status, functions and practices constituted the essential economic market for the green coffee after it was imported by the Importer as such, (R. 120)

see admissions, and (2) the established traditional Roaster industry status, functions and practices as such, were indispensable to the normal distribution of coffee in the United States.

5

Therefore, since the coffee import program as spelled out by the Directive did not expressly nor impliedly make any change in, or include the traditional established Roaster industry status, functions and practices as such, the average business man was not unreasonable in concluding that in the continued lawful competitive conduct of his business as a Roaster, (a) it was not necessary to change his traditional status, functions and practices to accommodate this import program, and, (b) that this coffee import subsidy program was concerned strictly and exclusively with the Importer status, functions and practices as such. The program neither gave the Roaster as such any added status, functions and practices, nor did it plainly take away anything from his traditional Roaster status, functions and practices, in all of which he had hitherto labored in complete economic equality with all other Roasters as such regardless of whether he or any other Roaster may have also had and exercised the separate and different economic functions of an Importer.

6

PURPOSES OF THE CONTRACT

In the light of the foregoing intent and purposes of the program, let us determine whether the plain intent and purposes of the contract are different, conflicting with, or more enlarged as to the traditional Roaster status, functions and practices as such, than those as set out in the program.

7

It is admitted that at the time of the original program and contract there existed certain established, known, traditional characteristics, statuses, functions and practices in the coffee indsutry of the United States. (R. 119, 120 & 135).

8

Did the initial coffee import program clearly spell out prospectively or retrospectively, any of complainant's roaster industry traditions, status or practices as such, which the program clearly burdened, prohibited or altered? Did the coffee import contract do so? If so, complainant has been unable to find the language that plainly has such effect. On the contrary, the import program and the contract both left the traditional Roaster industry status, functions and established practices exactly as they were.

9

Therefore, this contract relating to the Importer status, functions and practices of the coffee industry was reasonably expected and interpreted by the complainant, to have no relation to the Roaster status, functions and practices as such, for the simple reason that traditionally in the coffee industry the Roaster status, functions and practices do not include, contemplate or signify importations of green coffee or any of the status, functions or practices of the Importer as such (R. 14).

10

The original and amended contract directly concerned the importation of green coffee into continental United States by the Importer who as such had the qualifications expressly set out in the contract. The contract in part provides:

"* * * R.F.C. has established a subsidy on green coffee imported into the United States, and,

"* * * *the importer is and has been regularly engaged in the importation of coffee* (emphasis ours) and had an import quota established under W.F.O. 63 of the Department of Agriculture." (R. 41).

Thus the subject matter and intent of the contract is initially clearly established as being "the Importer" status and practices and the coffee so to arrive in the continental U. S. resulting from the actual exercise of such importer practices by "the Importer" as such. This is further confirmed by the express definition of "coffee covered" and otherwise by the total tenor of the contract as is reflected throughout its language and particularly at Paragraph 2 thereof (R. 42). Certainly there is nothing in this language clearly showing any intent to include any interest, prejudice or concern whatever with complainant's Roaster status and functions, either prospectively or retrospectively.

11

Complainant invites and urges respondent to point out in the language of the original contract any equally clear expression of prejudice to, or inclusion therein, of any lawful traditional Roaster industry distribution practice by complainant as such.

12

DOES THE FACT THAT THE ROASTER STATUS WAS INTEGRATED WITH THE IMPORTER STATUS, OF ITSELF CLEARLY POINT OUT PREJUDICE TO THE ROASTER STATUS AS SUCH?

At all times pertinent it was commonly known that the industry of the United States was not entirely composed of those who were engaged exclusively in the exercise of singular mechanical and economic functions. On the con-

trary it is traditionally composed of well defined and distinctive segments, each having its own established economic, mechanical and functional inherent requirements, purposes and practices, as was recognized in Booth Fisheries v. Bowles, 153 F. (2d) 449; Electromatic Distributors v. Clark, 162 F. (2d) 212, where it was considered whether a traditional status and functional consequence when engaged in by an integrated management, would necessarily cause or reasonably imply prejudice to, or inclusion of, another and different status and function. The Court upheld the realities of established business practices, in all essential respects identical to the case presented here. In the Booth and the Electromatic cases, supra, the problem was as in the instant case, one of intent and interpretation. Both arose out of regulations under the identical law involved in the case at bar.

13

If there is any difference in the interpretation of the intent and purposes of the identical law between the effect of the Booth case, or Electromatic case, supra, and the case now before the Court, because one arises from contract and the others from regulations under that same law, that difference lends further propriety to petitioner's case, for in neither of the cited cases was there any necessity for mutual consent to such prejudicial departure from established industry practices and consequences, while in the instant case not only is mutual consent essential but it and the intent of the law itself to prejudice in a contract what it does not provide in a regulation, must appear so plainly as to overcome the natural refuge in the traditional coffee industry practices of the Roaster status as such (and the natural understanding within the Roaster industry of the language employed in the contract). (R. 121) (50 U.S.C.A. App. 902 (h).) It is interesting to note

further recognition of the distinction between the Roaster as such, as distinguished from the Importer as such, in Great A & P Tea Co. v. Porter, 156 F. (2d) 813 (813).

14

It cannot be doubted that the contract related to and directly concerned a well defined segment of the coffee industry of the United States. But does it clearly concern all segments or only one or more? It is obvious that the coffee industry had acquired its distinctive segments and their traditions, characteristics and practices. It is common knowledge that the making and performance of contracts covering foreign purchases and importations of that coffee into continental United States is the essential practice of the coffee importer industry, and through the years such practices and the language commonly employed by the industry would take on a fixed and accepted significance within the industry.

15

It is reasonable for petitioner having been engaged in the coffee industry for more than 30 years, to assume to understand and interpret a contract relating to the importation of coffee, in the light of traditional established practices inherently characteristic of that industry. It would be exceptional and unnatural in such circumstances to insist that the petitioner should have anticipated a purpose, intent or consequence from a contract relating to the industry, that is contrary and prejudicial to the long established practices of the industry. Therefore, the only way in which this contract, or the amendments can lawfully prejudice for the first time in history, the established practices of the Roaster industry as such, is for the respondent to show clearly the exceptional and unnatural purpose, and intent of the Act under which the contract arises.

15

16

Since it is clear that the intent of the Act, program and original importer contract do not spell out prejudice to or inclusion of the traditional Roaster industry established status, functions and practices as such, it seems that if such prejudice was anywhere spelled out clearly or enlarged, either prospectively or retrospectively it must plainly appear in Paragraph 14 of the amendments; and must point out distinctly the definite intent to, (a) depart from the long established industry significance of the term "the Importer" and the term "the Roaster" as they relate to the traditional status, functions and practices of each, and (b) must definitely point out the mutual intent to enlarge and extend for the first time (and retrospectively) the industry status, functions and practices so as to include the Roaster status and practices within the status, functions and practices of the Importer.

17

PARAGRAPH 14 OF THE AMENDMENT:

Let us see how clearly Paragraph 14 (R. 51) points out its unnatural intent and mutual agreement to prejudice the Roaster status and functions which had not theretofore been the subject matter of the contract, after complainant had already operated 4 months under the original contract.

18

The pertinent language (R. 51) of the last amendment, under which this complaint arises is:

> "This agreement dated November 19, 1945 made and entered into between R.F.C. and the Importer (petitioner) • • • is hereby modified by mutual agreement in the following terms:

(change in time of coffee arrival in continental United States and custom house clearance * * * change in time for the Importer to file claims * * * change in date * * *)

"In the event of an increase in or removal of OPA maximum prices on coffee, *the Importer* shall pay to R.F.C. an amount equal to the equivalent of the increase in value of *his inventory;* computed as follows:

(a) The rate shall be 3¢ a pound green basis or the increase in OPA maximum prices, whichever is lower.

(b) The inventory shall include all types of coffee * * * which either *the Importer* owns *in the continental United States* or for which a bill of lading covering shipment to the United States *for the Importer's account has been issued in a foreign port;* * * * (Emphasis ours)

19

The amendment then reduces the total of the Importer's described inventory by the quantity of such coffee as the Importer has sold at the old OPA price prior to increase in effect April 1, 1946.

20

There is absolutely no change made in the significance of the term "the Importer." Certainly this language does not plainly say that the status, functions and practices of the Roaster as such, is to become retroactively and prospectively prejudiced *only when exercised* by one who also exercises the separate and different status, functions and practices of the Importer. The plain effect of the continued use of the same language as originally pointed out that "the Importer" is intended to signify the function and consequence of having engaged in the importation of coffee, is to imply that it is not intended to extend any

more prejudice to the continued Roaster industry status and practices than had existed prior to or under the original contract. It cannot be overlooked that this was an importing production program, and R.F.C. had and claims no authority to fix or control prices. Nor can it be forgot that complainant had actually expended the funds for which it now seeks mere reimbursement as agreed. Such payment may be called a "subsidy" but the fact is it was not a "windfall" to complainant, for the price of replacement coffee essential to a normal stabilized economy was forthwith increased more than 3¢ per pound. Petitioner had expended the identical sum in accomplishing imports in its Importer capacity. (R. 132)

21

In the light of the purposes of the contract and the traditional industry practices, the most that can be said for the language: "• • • *the Importer owns in the continental United States or for which a bill of lading covering shipment to the United States for the importer's account* (emphasis ours) has been issued in a foreign port;" is that it is uncertain whether the Roaster status and function as such is intended to become prejudiced by integration with the status and functions of the Importer as such. It is suggested that the draftsman actually did not intend to call the Roaster the Importer. For the Roaster was not concerned with getting coffee into continental United States. Moreover, all the coffee acquired by the Roaster was acquired in such industry practice wholly from domestic stocks. Therefore, the language "owns in continental United States or for which a bill of lading covering shipment to the United States for the importer's account" was pure surplusage and utterly inapplicable to any roaster function or roaster's inventory. This language could reasonably be understood to imply that it meant

either the coffee which the Importer as such had already imported into continental United States or, coffee that he had purchased in a foreign country for shipment to the United States.

22

Such a showing cannot be made by *considering only* Paragraph 14 of the Amendments (R. 51). Nor is such a showing made by the existence of a wilderness of ukases, directives and regulations (such as, "ownership or control" clauses of the meat subsidy), many of which are designed to defeat recovery or accomplish a forfeiture. No such showing has been or can be made, for the terms "the Importer" and "the Roaster" have never been synonymous in the coffee industry, and the Act did not intend that such terms and the practices of the industry to which they relate were to become interpretatively synonymous either in contract or in a regulation, (and retroactively so) for the first time in history with the advent of Paragraph 14 after some four (4) months prior operations under the original contract. (R. 51) Priebe & Sons v. U. S., 68 Sup. Ct. 123 (2-125); Lamont Corp. v. Bowles, 149 F. (2d) 364, cert. denied 66 Sup. Ct. 37, rehearing denied 66 Sup. Ct. 136; U. S. v. Stanolind, and authorities cited, 113 F. (2d) 194; Dixon Iramaous & Cia. Ltd. v. Chase National Bank of New York, 144 F. (2d) 739, cert. denied 65 Sup. Ct. 678; Peebles v. Prudential Insurance Co., 110 F. (2d) 76; Burley v. Elgin I&ER Company, 140 F. (2d) 488, followed in 66 Sup. Ct. 721; Councilor v. U. S., 89 Ct. Cl., p. 473; Tennessee Gas & Transmission v. El Paso Natural Gas Company, 166 F. (2d) p. 9 (1) p. 12 and authorities there cited.

23

Doctrinaire construction ought to admonish against a construction in disregard of industry and economic reality.

(Gaulden v. Southern Pacific Co., 78 Fed. Sup. 651 (656); Foley Bros. v. Filardo, 69 Sup. Ct. (5), p. 578; 12 Am. Jur. 784, Contracts, Sec. 247, and pp. 772, et seq.' Sec. 241, 242; New England Mutual Life Ins. Co. v. Harvey, 82 Fed. Sup. 702; 10 Tex. Jur., p. 356; Jno. L. Denning & Co. v. Fleming, 160 F. (2d) 697; Barksdale v. Fleming, 160 F. (2d) 494).

24

Even if the order as claimed by respondent, has the force of a statute, determination of intent must take into consideration the context of the whole, the circumstances and purposes (People of Puerto Rico v. Shell Co., 302 U.S. 258, 58 Sup. Ct. 169 (3)).

25

Since there are no specific provisions expressly including the traditional Roaster practices within the contract, complainant feels it sound to determine that such status was excluded and not included (*Furi & Co.* v. *Bowles,* 152 F. (2d) 713; *Royal Packing Co.* v. *RFC,* 169 F. (2d) 999). If the traditional background of the industry and the provisions of Sec. 902 (h) of the Act were not to be considered in determining the intent of this contract petitioner was entitled to plain language of such drastic, discriminatory departure from traditional industry understanding and practices.

26

Effect of respondent's interpretation is to limit or partially control the profit, value, income or the competitive position of the petitioner in its continued lawful exercise of its traditional Roaster status industry practices and to forfeit and deprive it of a substantial portion of the lawful value of such Roaster class of inventory, and to impede and place petitioner at a substantial competitive disadvantage as a Roaster in the established industry practices of distribution.

27

Alternatively, the sense of this contract is rendered ambiguous by the amendments thereto, as respects the petitioner's continued lawful exercise of its traditional Roaster industry status and practices (R. 126) equally and alike with all Roasters without regard to integration.

28

THE EFFECT OF SECTION 902 (h) OF THE ACT

Section 902 (h) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. 902 (h)), clearly provides that the power to pay subsidies under Section 902 (e) (under which this contract was made (R. 171)), shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except where such action is affirmatively found to be necessary to prevent circumvention or evasion. It does not say these impediments are sanctioned in the case of a contract and forbidden only in the case of a regulation. Nor does it provide for any waiver of such requirements to the validity of either.

29

Would an interpretation of the contract as amended, in a manner consistent with Sec. 902 (h) and the traditional industry practices of the Roaster as such, as distinguished from the Importer as such, tend to circumvent or defeat the purposes of the contract or the law?

30

The status and functions of a Roaster as such obviously did not qualify one as an Importer under the contract. The status and functions of an Importer as such under the con-

tract would not necessarily include the different status and functions of the Roaster as such. This is precisely the distinction as petitioner found in the contract, and is the same as has traditionally obtained in the practices of the industry. Therefore, when the term "the Importer" was employed it was in respect of its importing sense and not intended to either enlarge or diminish the traditional distinctions of recognized status and practices by the industry or the specific qualifications spelled out in the contract whereby one became recognized as "the Importer".

31

In short, the declared prime purposes of the coffee import subsidy Act and the authority for contract were to aid and encourage * * * not to complicate or further disturb the * * * importations and to restore and stabilize normal established distribution. This could not be done except by the Importer engaging in more importations and passing the coffee thus imported by him (on which only he was eligible to receive the subsidy), along to the Roaster.

32

Distribution by the Roasters as such, in the United States was taken care of by the established practices and the economics of the industry itself. Sec. 902 (h) of the Act shows it was not intended to burden or disturb whether by contract or regulation the design of the normal flow of domestic distribution as the same had long been established in the United States. That flow had always been and remained, from the Importer who bought and received the green coffee from the foreign country, into the inventories of more than 1,000 Roasters as such, in the United States equally and alike without regard to R. F. C. import contract eligibility and, from all these many Roasters equally and

competitively into consumer store outlets, wholesalers and institutions.

33

To further aid in stabilizing the economy and quantity available for the desired distribution, W. F. O. 146 (11 F. R. 3785; R. 94), determined the reasonable quantity and equitable distribution of green coffee in everybody's inventory equally and alike. It allowed each of more than 1,000 Roasters to have and keep on hand at all times (which forced equal opportunity for replacement of such inventories), 3½ months' supply in inventory. But it allowed the Importer only 1 month's supply in inventory at any time. There were 312 Importers as the maximum participating in this Import program. When it is remembered that some of these Importers were Roasters also, it becomes fairly obvious that the desired and inevitable effect of the Import program was to encourage the movement and continuing replacement of coffees, not only from foreign countries into the inventories of Importers in the continental United States, but in 3½ times 1,000 larger quantities of constant inventories into the hands of all Roasters equally and alike without regard to whether any Roaster was or was not also an Importer. In short, the purpose was to bring about a stabilized condition—one that contemplated continued flow after the contract ended—rather than mere stop-gap of momentary expedient.

34

Certainly it was not the purpose or intent of the Act to substantially prejudice an established distribution practice by accident. But even if the prejudice had come about through accident, petitioner would still be fairly entitled to the same treatment as all others economically situated identically and directly competitive as a Roaster. It is no

accident that the word "SHALL" appears in the prohibitions as set out in Section 902 (h).

35

Because of the inherent design and economics of the coffee industry in the United States, coffee could not have become normally available for distribution to the consumer except for the continuation of all the practices of the Roaster status. It is hard to see how the court below aids the purpose of the Act by deliberately harming the Roaster established industry practices—while at the same moment encouraging the Importer to do the very things that caused the Roaster prejudice—importing more coffee for the sole economic purpose of passing it along into the hands of the Roaster. (*Genser* v. *R. F. C.*, 169 F. (2d) 136 (3); *Markbreiter* v. *Woods*, 169 F. (2d) 875; *Royal Packing Co.* v. *R. F. C.*, 169 F. (2d) 999; *Swift and Company* v. *R. F. C.*, 79 Fed. Supp. 546.)

36

If Section 902 (h) means anything at all, it means that respondent cannot unnecessarily interpret its contract or issue an "order" as to require that the known, traditional established practices and economics by which distribution normally flows in the coffee industry shall be burdened where none has before existed; that respondent may not so cause the prejudice of added costs to be visited upon or result from an established lawful coffee industry practice; and may not do so indirectly or directly, by contract or by regulation and above all, it shall not do so discriminatorily.

37

In brief, this section forbids any unnecessary burden upon or interference with, the normal distribution effected by sale or purchase, from the foreign countries where the

coffee is grown, to the Importer and from the Importer to the Roaster and from the Roaster to consumer outlet channels such as, wholesalers, retail stores and institutions. This is and has traditionally been the normal method or flow of distribution. Equally traditional has been the Importer's method of distribution to sell his imported coffees to the Roasters—all Roasters equally and alike, regardless of whether any particular Roaster so acquired all or merely a part of his requirements from the Importer.

38

It is common knowledge that all segments of the coffee industry are highly competitive in the United States. The competition was not sought to be eliminated or forbidden by the Act, program or contract. It is our economic situation fostered by the program and undeniably attendant upon restoration and stabilization of normal distribution and economy. It is between products rather than between various means or systems of distribution, selling or merchandizing. (*Bowles* v. *Wilson & Co.*, 63 Fed. Supp. 687.)

39

Complainant urges that Section 902 (h) had a real, rather than a nebulous purpose and intent. It was concerned with the reestablishment and stabilization of normal economy and established distribution practices and in the protection thereof. Its effects ought to be reasonably discernible to an ordinary business man traditionally engaged in the normal established practices of the industry to which the contract is related. He should be able to readily and plainly determine that his normal conduct has suddenly become contrary to law, or prejudicial to his continued normal industry practices. (*U. S.* v. *Figur, et al.*, 80 Fed. Supp. 140 (4 & 5); *U. S. Gypsum Co.* v. *Brown*, 137 F. (2d) 803; *Phila-*

delphia Coke Co. v. *Bowles,* 139 F. (2d) 349 (18 & 19).) Petitioner's conduct was not special or exceptional but was clearly that of the established and traditional Roaster industry distribution practice.

40

In the light of reality the real intent of this entire undertaking was to (lawfully) encourage the Importer's importations; the Roaster's essential place in distribution and in the economy by his consequent acquisitions of the coffee from the Importer and a continuing of normal established processes all along the line—from the Roaster who processed it and in turn put it in usable form for Consumer trade outlets. If that objective could best be encouraged by discouraging the traditional and fullest activity therein by all Roasters alike and all Importers alike, then petitioner has followed an outmoded understanding of our economy and of good reasoning as well. (*U. S. Gypsum Co.* v. *Brown,* 137 F. (2d) 803; *Philadelphia Coke Co.* v. *Bowles,* 139 F. (2d) 349 (18 & 19).) The best way to get a restored and stabilized economy is for all concerned to continue their normal activities to the fullest possible extent, rather than to encourage one part and handicap another equally essential part of integrated industry.

41

Could these purposes be best accomplished by penalizing a Roaster who obtains a part of his inventory from Importers—when admittedly the identical Roaster status who obtains all his inventory from the Importer thereof is not penalized? If so, is that the best way to encourage one to exercise his Importer status and his Roaster status in aid of normal distribution? It seems academic that NORMAL distribution does not contemplate a diminishing activity

by either status or function. Most assuredly normal economic stability cannot be achieved by disruption or a competitive discrimination.

42

REASONABLE CONSTRUCTION OF THE CONTRACT

Every agreement is made and to be construed with due regard to the known characteristics of the business to which it relates and hence the language used in a contract will be construed according to its purport in the particular business, although this results in an entirely different conclusion from what would have been reached, had the usual meaning been ascribed to those words. (*Franklin Sugar Ref. Co.* v. *Wm. D. Mullen Co.*, 12 F. (2d) 885 (887).)

43

In construing bills of lading as in construing other commercial instruments, it is right and duty of the Court to look, not only to the language employed, but to the subject matter, and to the surrounding circumstances, in order to determine the proper effect of the language used, by putting itself, so far as possible, in the place of the contracting parties. It has regard therefore, to all the prevailing usages and customs of business. (*W. R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha*, 12 F. (2d) 519 (521).)

44

It is a fundamental rule that in the construction of contracts the Courts may look not only to the language employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. (*Merriam* v. *United States*, 107 U. S. 437, 441; 2 Sup. Ct. 536, 540; 27 Law. Ed. 531.)

45

Words used in a contract, while not ambiguous in the abstract, may, when considered in relation to the circumstances surrounding the making of the same, create an ambiguity requiring interpretation. *Klueter* v. *Jas. Schlitz Brewing Co.*, 143 Wis. 347, 127 N. W. 43, 32 L. R. A. (N. S.) 383—and cited in *Ark. Amusement Corp.* v. *Kempner*, 57 F. (2d) 473 (7), where the reasonableness or unreasonableness of the result was inquired into.

46

Since the traditional established industry practice has never been to consider the Importer status and functions as synonymous with or prejudicial to the Roaster status and functions, the mere reference to the Importer status and functions as such in respondent's original contract and a repetition of the identical language in the amendments was not fair notice of intent to prejudice the lawful continuation of the Roaster status and functions as such even though both were integrated under one management, if to do so would plainly for the first time discriminate against the petitioner in its lawful exercise of its Roaster status and functions equally and alike with all other Roasters identical as such.

47

In *Commodities Trading Corporation* v. *U. S.*, 83 Fed. Supp. 355 (356) the government requisitioned black pepper owned by the plaintiff and attempted to pay him at the ceiling price of 6½¢ per pound. The Court holds that the government had no authority to deny the owner of non-perishable property of the right to hold his property until controls expired, and therefore, the ceiling price is not the measure of value of the property requisitioned. This case and the cited ones ought to be good authority to show that the re-

spondent's interpretation by which it claims authority to issue its "order" depriving Duncan Coffee Company of a part of the value of its non-imported Roaster status inventory would be invalid. It tends to show the climate within which the effect of the alleged "order" should be properly determined. Green coffees are commonly known to be no more perishable than black pepper when stored in the usual way by one engaged in the coffee business.

48

A contract should be construed so as to give it a reasonable effect. "An interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results." Williston on Contracts, Section 620, 1936 revised edition.

49

The interpretation of this contract contended for by respondent would not be fair and reasonable since it would jeopardize and penalize the petitioner 3¢ per pound by denying its right to continue to lawfully engage in its Roaster status equally and alike with all other Roasters as such. Moreover, since the contract contains no language directly or impliedly concerning petitioner's Roaster status and practices or the normal results thereof as such, if in fact it were intended that the language actually used should prejudice both the Importer status and the Roaster status then such language obviously is ambiguous and the petitioner is entitled to the benefit of such ambiguity. (*Bruns, Kimbell Co.* v. *National Pressure Cooker Co.*, 83 Fed. Supp. 258.)

50

Respondent cannot lift paragraph number 14 of the modification out from all else and bind petitioner by an inferential interpretation solely upon the single isolated paragraph,

which did not become effective until after the lawful Roaster industry practice had continued without prejudice for 4 months, and thereby fix more than $67,000.00 retroactive prejudice upon the petitioner. In the light of realities the reasonableness and necessity for expecting this Roaster to anticipate that his identical Roaster status and functions were intended to become prejudiced solely because he had and performed the additional and different Importer status, while many other economically identical Roasters economically competitive with him, were not to be or become equally prejudiced, must tax the understanding of the average business man. Certainly such reasoning does violence to the economic reality of this contract in relation to the industry it concerns.

51

WAS THERE MUTUAL CONSENT?

It is clear that recapture was not provided for by the original import contract but came about only by modification after 4 months operation under the original contract. Any modification necessarily relates to the original contract, including the definitions and the implications therein set out. Since the definition of the Importer status of the complainant was not modified in any way, and, only the particular class of inventory that was to become subject to recapture was set out, we are entitled to determine whether this language of the modification clearly pointed out prejudice to the continuation of the lawful known Roaster industry practice and class of coffee which had never before been subject to any prejudice, and if so, whether such prejudice was retroactive, was invalid, or intended or consented to by the petitioner.

52

The modification of course, relates back to the original contract; it could not enlarge the original contract or exclude

any of its provisions except with the same clarity as was employed in the original contract.

53

Considering the inescapable fact that such language does treat the Importer status and imported class of coffee equal and alike with all other Importers regardless of whether any such Importer does or does not have also a Roaster status, and considering the further fact that the established practices of the industry known at all times to the respondent were traditionally such as to lawfully endow the petitioner with a valid lawful Roaster status, and in such Roaster status in every other instance of government controls and industry tradition was treated and dealt with in all things equally and alike with all Roasters regardless of Import status, and considering the fact that both the Director and respondent could have plainly stated their intent to prejudice any Roaster status that was related to or integrated with an Importer status (as they actually did by the "ownership and control" relation in the meat subsidy) it therefore, was not plainly intended to have the term "the Importer" mean or imply a different status when used in the last part of this modification, from the sense, meaning, implications and effects of the same term when used in the beginning and elsewhere in the same contract.

54

Even the grammatical analysis and sense of the particular phrase "which either the Importer owns in the continental United States or for which a bill of lading covering shipment to the United States for the Importer's account has been issued in a foreign port;" (1) plainly implies (if it does not expressly so state) that it is concerned with coffees which either "the Importer" had actually already imported

and received in continental United States or, (2) coffees which "the Importer" had purchased in the foreign country for importation (bill of lading issued for the Importer's account in the foreign port) to the United States. Especially is this true when it is remembered that such is entirely consistent with the traditional industry significance, practices and functions.

55

It cannot properly be said that the language: "The inventory shall include all types of coffee," is sufficient to plainly warn complainant of the pitfalls ahead, for "types" in the coffee industry has never meant or implied anything other than the characteristics of different kinds of coffee, generally with particular reference to the place where it is grown. Respondent does not challenge this fact (R. 123).

Argument under Summary (C)

DISCRIMINATION RESULTING FROM RESPONDENT'S INTERPRETATION

1

The known established practices and Roaster status were traditionally a material element in the distribution and other practices and economics of the coffee industry.

2

It cannot be contended that recapture on the non-imported, non-subsidized Roaster class inventory was necessary or intended to equalize this Roaster with all other Roasters, for it obviously had the exact opposite result. Nor can it be denied that the Director had authority to bring about equal recapture upon the substantial quantities of the identical class of coffee in the hands of all other 688 out of the 1,000 Roasters as such, in the country. A complete answer to the idea that petitioner intended to agree to this singular

prejudice upon its Roaster status and functions lies in the fact that (a) the petitioner was limited in its permitted inventory to the identical supply (3½ months) as were all the other 1,000 Roasters (hence could not benefit by limiting its source exclusively to its own importations, and (b) the petitioner paid the full recapture and does not complain of it, upon every pound of its imported class of inventory, equally with all Importers. Amendment of May 7 by its method of crediting sales by the Importers made at former O. P. A. prices prior to the increase, had the effect only to equalize as to IMPORTED class of inventory only, on which the subsidy had been received by the Importer.

3

Therefore, it is clear that short of a police state, it was not intended, and the stabilized competitive economy and distribution contemplated by this contract, and proper interpretation of the entire contract does not require that the Roaster status and functions, non-subsidized, were to be prejudiced by 3¢ per pound competitive discrimination. It would be unreasonable and contrary to natural justice to impose such prejudice consequent of the status and functions of this Roaster as such, merely because he had and lawfully performed the R.F.C. importing contract for which he has paid recapture on all the coffee imported thereunder, while at the same time allowing many other economically identical Roasters as such, composing a substantial consequence in the industry economy (688 out of 1,000), to remain completely free from burden, although all are highly competitive.

4

"WINDFALL!"

To recover money actually, lawfully and necessarily in good faith first expended in the performance of a contract,

is neither inflationary nor a windfall, particularly when the accomplishment of economic stability and normal distribution flow is known by common sense to require immediate reinvestment and risk of the identical funds.

5

Unfairness, discrimination and unreasonableness unnecessarily result from the "order", or contract, as interpreted by respondent because it draws a distinction between Roaster status and functions and the majority of other identical Roasters as such, economically identical and competitive with complainant, and thereby imposes prejudicial economic and competitive handicap not characteristic of the industry. It is generally regarded as essential to fair treatment that all persons who are similarly situated be dealt with on an equal basis; that no greater burdens should be laid upon one than is laid upon others in the same calling and condition. This principle was applied by the United States Emergency Court of Appeals in the case of regulation which was found invalid because it subjected the complainant to a competitive handicap "not characteristic of the industry prior to price control and which, • • • is wholly unnecessary for the effectuation of the purposes of the Act". (*Consolidated Water Power and Paper Co.* v. *Bowles,* 146 F. (2d) 492 (3 & 4), citing *Barbier* v. *Connolly,* 113 U. S. 27, 5 Sup. Ct. 357, 359, 28 L. Ed. 923; *Flett* v. *Bowles,* 142 F. (2d) 559 (565); and *Hawaii Brewing Corporation* v. *Bowles,* 148 F. (2d) 846 (2, 3, 4, & 5).)

6

The substance of respondent's contention is simply that, petitioner having lawfully entered into the Importing contract in its Importing status, thereby prejudiced (and retroactively) its equally lawful, necessary and long estab-

lished Roaster status and functions inevitably resulting from a continuation of normal industry distribution practices, (which practices were essential to the economic success of the purposes to which the contract was dedicated) at a material disadvantage with many economically identical and competitive Roasters as such, and that such prejudice was consequent solely because its Roaster status is integrated with its Importer status.

7

It is admitted that petitioner's economic existence depends upon the competitive conduct of its business as a Roaster (R. 129 B. App. 43). The lower court's interpretation necessarily disregards entirely one essential leg of the economic foundation upon which the successful accomplishment of normal stabilized distribution must rest.

8

Where the dominant purpose of the law is to restore and stabilize normal distribution, and the dominant purpose of the contract in the stabilization atmosphere, is to aid and encourage importing of coffee, and the contract is highly vocal as to the Importer practices as such, but is wholly silent as to the coffee Roaster's known, established practices as such, and the practices of each are different, but both are vital to normal traditional established distribution with which the law out of which the contract arises is concerned, the contract ought not to be interpreted so as to burden the Roaster practices unequally and unlike as to all Roasters as such, while it burdens equally and alike all Importers as such, merely because the industry includes some Roasters as such who are integrated under a single management with the Importer practices as such, and because the burden arises from contract under the identical law rather than

under a regulation (both being authorized but not distinguished by this law), when the distribution, economic practices and purposes and dependency of all Roasters as such are identical and such practices do not include importing. Burden and discrimination among those engaged in identical economic established practices and having identical economic dependency as such, should occur, if at all, only when plainly required, and by affirmative finding of necessity, and never by inference or innuendo.

9

It has been suggested that paragraph 14 (c) of the contract would be meaningless if the Roaster's practice as such were not burdened when integrated with the Importer practice. This is not necessarily correct. For the contract provides for certain forfeiture of subsidy by the Importer as such. It could mean that if the Importer's inventory included coffee on which his claim for subsidy had been denied or forfeited, and the Importer had thereby not received as much subsidy as he had coffee in inventory, he the Importer would not be required to pay or repay to R.F.C. a greater sum than he had been paid (reimbursed) by R.F.C. Certainly its meaning is not so clearly set out as an original burden upon the Roaster distribution practice as to be the equivalent of the "ownership and control" clause of other subsidies by regulation, or to include the Roaster practices in the purview of the contract. Should a contract under the same law be less clear than a regulation?

Conclusion

Petitioner urges that a proper interpretation necessitates consideration of the foregoing and of the entire contract and the essential existing premises in the light of which this contract and the modifications were executed and per-

formed; that such consideration will fairly and reasonably entitle petitioner in law, intent and natural justice, prospectively and retrospectively, to the relief from the prejudice of $79,059.36 upon its Roaster status and functions as such, alternatively, to relief from such portion of such prejudice as has been suffered retroactively and here accordingly requests such relief.

Respectfully submitted,

DUNCAN COFFEE COMPANY,
Petitioner,

By SAMUEL H. PEAK,
Petitioner's Attorney of Record.
1200 Carr Street, Post Office
Box 2079, Houston 1, Texas.

APPENDIX

FACTS ADMITTED IN RESPONDENT'S ANSWER (R. 134 to 137 Incl.)

1. Complainant duly and timely on the 8th day of December, 1948, filed its protest of such failure and withholding of the complainant's earned funds and each part thereof, as above, with the respondent, a true copy of such protest being attached hereto and made a part hereof for all purposes and marked "Exhibit 4"; that on or about the 16th day of February, 1949, the respondent in writing denied said protest in its entirety in accordance with true copy of such denial attached hereto for all purposes and marked "Exhibit 5."

2. Admits that the objections set forth in the complaint are those asserted in the protest as amended and are those upon which the complainant intends to rely in considering its complaint.

3. The established coffee industry of the United States includes (1) Importers of green coffee whose functions as such are limited to the purchase of green coffee in foreign countries and importation thereof into continental United States, and the sale and distribution of such imported green coffee to Roasters in the United States; (2) Roasters of green coffee whose functions as such are limited to the domestic purchase of green coffee, principally from Importers thereof, the roasting, blending, packaging, sale, and distribution of such roasted coffees into established wholesale and retail consumer trade outlets, and whose functions do not include the importation of green coffee; (3) the Roaster-Importer whose functions are dual and include those of Importer as such, and also those of the Roaster as such.

4. All of the Roaster's functions are performed by the Roaster-Importer in its capacity and status as a Roaster, and are identical in all things, purposes and effects with the functions of the Roaster as such who does not import green coffee.

5. The essential purposes of the business of all Roasters alike without regard to Importer functions, is the acqui-

sition of green coffee primarily from Importers thereof, the processing of such green coffee and the subsequent sale and distribution of such pocessed coffees to wholesale and retail consumer trade outlets.

6. The essential purposes of the business of all Importers is such without regard to Roaster functions, as the acquisition of green coffee in foreign countries, importation thereof into continental United States and the resale and distribution of such imported green coffee to Roasters.

7. The coffee industry of the United States includes many separate and distinct enterprises whose established, traditional and normal functions are as above described in each respective category.

8. The Roaster functions by which complainant acquired its Roaster status inventory were identical in all things economically and mechanically with the functions of each of the Roasters as such equally and alike acquired their Roaster status inventories, regardless of Importer functions or status, and such Roaster functions are the traditional, normal, and established practices of the coffee industry throughout the United States and as such are common knowledge and understanding.

9. Extension of the Emergency Price Control Act as amended did not occur until after this green coffee subsidy program and contract had terminated.

10. Section 902(h) of the Act remained in effect at all times herein.

11. All O. P. A. Price Control Orders, Rules, and Regulations applied in all respects to complainant in its Roaster functions as such, equally and alike with all other Roasters, without regard to whether any Roaster did or did not have or exercise any Importer function or status.

12. All O. P. A. Price Control Orders, Rules, and Regulations applied in all respects to complainant's Importer functions as such, equally and alike with all other Importers, without regard to whether any Importer did or did not have or exercise any Roaster function or status.

13. In acquiring its Roaster status inventory by exercising its Roaster functions as such, complainant did nothing more and nothing less than did every other Roaster as such in the traditional, normal, established practices of the coffee industry. In exercising its Importer status the complainant did nothing more and nothing less than did every other Importer in the normal, established practices of the Importer as such, and complainant has fully repaid $110,135.25 to R. F. C. and does not complain of such recapture on its Importer status inventory equally and alike with all other Importers.

14. At all times pertinent it was common knowledge that complainant was and had been traditionally and lawfully engaged in the exercising of the established industry practices and functions of (a) a coffee Roaster as such, and, (b) a green coffee Importer as such; and it was commonly known that there were separate and distinct enterprises traditionally existing and established in the coffee industry of the United States having and lawfully exercising such dual functions, practices and characteristics in the identical manner as did the complainant.

15. Neither the original contract, nor the amendments required or prohibited the continued exercising of the established lawful industrial functions and practices by complainant as a Roaster as such, or by complainant as an Importer as such.

16. There was no lapse of time between the execution of the contract and the effective date thereof.

17. In the coffee industry the term, "each type of coffee" means and signifies the particular trade characteristics of the particular coffee bean or beans, such as mild, soft, hard, acidity, earthy, etc., and usually indicates such characteristics as are common to the green coffee grown in a particular locality or under certain conditions and methods of cultivation, harvesting, or preparation for shipment.

18. At the terminal date of this contract complainant had on hand the following quantities and classes of green coffee:

(a) 393,712 pounds, which at 3¢ per pound amounts to $11,811.36, lawfully acquired prior to the effective date of the original contract; (b) the additional quantity of 1,482,228 pounds, which at 3¢ per pound amounts to $44,466.84, which complainant had not imported but had acquired instead in the exercise of the normal, established Roaster functions as such, prior to the first amendment; (c) 1,855,940 pounds, which at 3¢ per pound amounts to $55,678.20 likewise acquired in its non-imported, non-subsidy Roaster functions as such prior to the second amendment; (d) 385,660 pounds, which at 3¢ per pound amounts to $11,569.80 likewise acquired in its non-imported, non-subsidy Roaster functions as such, subsequent to the second amendment and prior to June 30, 1946; (e) 3,671,176 pounds, which at 3¢ per pound amounts to $110,135.28 and which complainant had acquired in the exercise of its lawful Importer functions as such under this Import contract. The total amount withheld from complainant by R. F. C. is $189,194.64 at 3¢ per pound on the total quantity of coffee in complainant's hands and which coffee was acquired, (a) prior to the contract; (b) as a Roaster prior to the first amendment; (c) as a Roaster prior to the second amendment; (d) as a Roaster subsequent to the second amendment and prior to June 30, 1946; (e) acquired by complainant in its Importer functions as such during the period of the contract as amended.

19. That complainant mutually agreed, understood, and consented to such withholding of the $110,135.28 at 3¢ per pound on 3,671,176 pounds of green coffee on hand at the terminal date of the contract and which complainant had acquired as the Importer under the contract in the exercise of its Importer functions as such.

20. That R.F.C. continues to withhold $79,059.36 at 3¢ per pound on: (a) 2,241,600 pounds of non-imported, non-subsidy coffee acquired during the contract period by complainant in its Roaster functions as such, and (b) on 393,712 pounds of coffee acquired by complainant prior to the original contract.

21. At all times pertinent, that class of complainant's Roaster inventory as such, on hand at the terminal date of

this program and contract, acquired from domestic sources in the continued lawful exercise of its normal Roaster functions as such (solely out of which this controversy arises) and, substantial quantities of inventory in the hands of all Roasters as such at the same time are economically identical in all things, regardless of whether any Roaster did or did not exercise to any extent also the status and functions of a green coffee Importer as such.

22. Complainant's Roaster status inventory and the Roaster status inventories of all the Roasters alike, without regard to Import contracts, were acquired, not by the exercise of any Importer function, but were acquired instead from the same identical domestic source of green coffee supply and traditional normal distribution within the United States from the various green coffee Importers as such who had themselves imported such coffees for the purpose of distributing such coffees to complainant and all other economically identical Roasters as such, and to a lesser extent from other Roasters, in the United States.

23. There were at least 1,000 established Roaster status enterprises as such in the United States, without regard to Importer functions.

24. There were a maximum of 312 Importer status enterprises as such, who participated in this green coffee Import subsidy program, without regard to Roaster status or functions.

25. Complainant is and has been traditionally a Roaster-Importer economically and mechanically identical, equally and alike in all Roaster functions with all Roasters as such, without regard to Import contracts, and identical equally and alike in all Importer functions with all Importers as such, with the exception of the fact that it resold to other Roasters a lesser proportion of the green coffee imported by it than that sold to Roasters by Importers who exercise no Roaster functions.

26. Complainant is a single independent private enterprise with its business office situated in Houston, Texas, operating three coffee roasting plants in Houston and Cor-

pus Christi, Texas, having approximately 30 of its own roasted coffee trade wholesale sales outlets from its own warehouse stocks of roasted coffee, and approximately 75 independent jobber wholesale trade outlets, situated at various locations principally in Texas, Louisiana, Arkansas and Oklahoma. All of complainant's business functions are integrated within a single corporation administered by a single management organization. All complainant's roasted coffees are sold by it under its own brand names.

27. Within the State of Texas alone complainant has approximately 40 Roaster competitors identical in all things as Roasters and only 6 of such Roasters exercise any Importer functions.

28. Within complainant's own sales area there are approximately 15 brands of coffee which are nationally or substantially nationally advertised, sold and distributed, and approximately 50 sectional or regional brands, all of which are directly competitive with complainant as a Roaster.

29. All the Roasters as such in the United States without regard to Importer function or status, were subject to the same identical Roaster controls, and, all the Importers as such, in the United States without regard to Roaster function or status, were subject to the same identical Importer controls.

30. The Roaster functions by which complainant acquired its Roaster status inventory were identical in all things economically and mechanically with the functions by which all Roasters as such equally and alike acquired their Roaster status inventories regardless of Importer functions or status, and such Roaster functions are the usual, normal and traditionally established practices of the coffee industry throughout the United States, and as such are common knowledge and understanding.

31. In acquiring their Roaster status green coffee from Importers as such, and from other Roasters, in the United States, (regardless of whether any Roasters did or did not also exercise any Importer function), complainant and all

other Roasters alike were thereby exercising a Roaster function as distinguished from an Importer function, and such function had long been commonly known and established as the normal distribution practice of the coffee industry, and, without the exercise of such Roaster function, there could be no normal market for, and normal distribution of, green coffee purchased in the foreign countries and imported by the Importers as such.

32. In the exercise of its Roaster status and functions complainant and all Roasters alike were subject to and privileged by the same identical green coffee allowances and controls of W.F.O. 146 which applied to all Roasters equally and alike without regard to Import contracts, and which continued in force without lapse until after this green coffee import program had ended and until coffee was decontrolled October 17, 1946.

33. Complainant and all other Roasters alike without regard to Import contracts, were subject to the same identical green coffee purchase price controls. Complainant and all other Roasters alike were economically dependent upon sales of their Roasted coffee to wholesale and retail consumer outlets in the United States. Complainant and all other Roasters alike without regard to Import contracts, were subject to the same identical selling price controls upon all their roasted coffee equally and alike. Complainant and all other Roasters alike made the same identical economical use, employment and distribution of their coffee, and such was the normal, established and commonly known industry practice.

34. It was also commonly known that complainant prior to the terminal date of this Importer status contract had lawfully expended a total sum equal to the amount now withheld from complainant by R.F.C., in the complainant's reasonable and proper accomplishment of actual importations in its Importer status, of an equivalent quantity of imported green coffee within the provisions and intent of complainant's Importer status contract number 268.

35. It is common knowledge that the business of all Roasters alike is highly competitive.

THE STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared Paul E. Taft, Assistant to the President of Duncan Coffee Company, complainant herein, known to me to be the person whose name is subscribed hereto, and who, after being by me first duly sworn, upon oath states, that each and all of the matters and facts as set out in the foregoing complaint are true and correct.

(Signed) PAUL E. TAFT.

Sworn to and subscribed before me this the 12th day of March, 1949.

(Signed) FLORENCE CANNAN,
Notary Public in and for Harris County, Texas. (Florence Cannan)

SWORN FACTS INTRODUCED WITH COMPLAINANT'S PROTEST PROCEEDINGS. (R. 4 to 17 incl.)

1

November 23, 1945, upon consideration of information as to the critical *need for encouraging imports of green coffee,* furnished by the O.P.A., the State Department and the Department of Agriculture, and upon finding that it is *necessary* to provide *for subsidizing imports* of green coffee to avoid a shortage of ~~coffee, the Stabilization~~ Administrator issued Directive 87 (10 F.R. 14450), authorizing and directing R.F.C. to establish and carry out a subsidy *program with respect to imports of green coffee.*

2

The Administrator so acted pursuant to the declared authority of the Stabilization Act of 1942, as amended (50 USCA App. 961 et seq.), *Executive Order 9250,* (note at end of 50 USCA App. 901) and other Executive Orders and Directives. Directive 87 and all amendments were issued under the subject: *"Imports of Green Coffee."*

3

Pursuant to Directive 87, and the Emergency Price Control Act (50 USCA App. 901 et seq.), as of November 19, 1945, R.F.C. in its corporate capacity and complainant *in its importer capacity,* (as the Importer engaged in the importation of green coffee), by mutual agreement and in consideration of their mutual promises, entered into their valid *coffee importing subsidy contract* whose provisions described the contemplated activities of the complainant and the class of coffees covered and concerned, thereunder.

4

For some 30 years prior to this time Duncan Coffee Company of Houston, Texas, was and remains, continuously engaged in the business of a coffee Roaster. In the long established Roaster industry practice, it has from time to time regularly acquired green coffee *from* (1) *Importers thereof,* (2) from other *Roasters,* and also from (3) its own importation directly from foreign countries. Such was the established Roaster industry practice at all times herein. A coffee Roaster is a manufacturer or processor of green coffee. Importation is merely one of the sources used by Roasters to obtain a part of their green coffees, to be processed by the Roaster capacity and then distributed into consumer trade channels.

5

The Importer does not acquire his green coffee from domestic sources but only from importations, and "the Importer" established industry practice is to sell such coffee to Roasters, including Roasters who may also import a part of their own requirements. All these facts were common knowledge and practice of the coffee industry at all times herein and were or reasonably could have been known to R.F.C.

6

At all pertinent times, there were more than 1,000 regularly established Roasters in the United States. Within the complainant's immediate trade there are more than 40

other identical and economically competitive Roasters, not more than 6 of whom are also Importers of green coffee. A maximum of 312 *Importers, and Roasters who also imported,* participated in this green coffee import subsidy program; 281 remaining after March 19, 1946, and 273 remaining after May 7, 1946, to the end of the program; (Letter September 8, 1948, Honorable Harley Hise, Chairman of the Board, R.F.C. to Senator Tom Connally). Out of all the 312 participants in the program it is a reasonable estimate that at least 250 were Importers who did not also engage in any Roaster capacity. The exact information is in the possession of R.F.C., or can be reasonably obtained by R.F.C. There are many Importers who are not also Roasters but whose business is confined wholly to the Importation of green coffee. All of the more than 1,000 Roasters, regularly procure either all or a part (many Roasters procure their total requirements) of their green coffee from these importers who are not Roasters. (R.F.C. Admissions, George B. Stover.)

7

Long prior to Directive 87, under W.F.O. 63 the Department of Agriculture had established maximum green coffee import quotas for each Importer capacity, without regard or prejudice, whether such Importer was or was not also engaged as a Roaster who as such acquired green coffee also from domestic sources, and O.P.A. had established the maximum purchase price which any Importer capacity could pay for green coffee in any foreign country. Selling prices for all green and roasted coffee in the United States were likewise established. These prices were identical and equal for all Roasters and all Importers.

8

In the lawful exercise of its Importer capacity, at the time of Directive 87 complainant had been assigned a quota of green coffee which it could import into the continental United States.

9

At no time from the beginning of government controls of coffee by O. P. A. order December 27, 1941, until decontrol

on October 17, 1946, was any restriction, limitation, prejudice or penalty ever placed by any authority upon the lawful continuation of complainant's exercise of all the practices of its Roaster industry, which was *not likewise placed equally, equitably and in identical manner, extent, purpose and effect upon ALL ROASTERS* economically alike, without regard to whether ANY ROASTER did or did not have also an Importer capacity (and vice versa)—UNTIL after May 7, 1946, when R. F. C. came to interpret the purpose, intent and effect of its modification of its green coffee import contract with complainant.

10

R. F. C.'s interpretation herein complained of *places a burden of 3¢ per pound ($79,059.36) upon complainant's* non-imported, non-subsidized *Roaster class of inventory* acquired in the lawful exercise of complainant's identical Roaster industry practice, *which is not placed upon substantial identical inventories of many other Roasters* acquired, used and sold in all things at and under identical times, circumstances, controls and economically competitive with that class of complainant's inventory.

11

There was no limitation, prejudice, jeopardy or restriction placed upon complainant's continued lawful Roaster industry practices equally with all other Roasters, by the express provisions of this original contract. Only its capacity as the Importer engaging in the importation of coffees was set out or referred to within the provisions and purposes of this original contract or of Directive 87. Neither the law, Directive, nor the original contract plainly fixed any prejudice upon complainant's continuing to engage in the established practices as a Roaster equally with ALL Roasters. The Relationship between the parties was treated with, considered and referred to at all times by the parties as a valid, binding and lawful contract within the contemplation of all pertinent laws and of Directive 87. A true copy of said contract and amendments is attached as Exhibit "A," the originals being in R. F. C.'s possession.

12

Prior to such importation by the complainant under said contract, R. F. C. knew that world market conditions were such that the complainant would reasonably be required to first expend a sum equal to the 3¢ import subsidy in order to accomplish the importation of coffee as contemplated by the contract, and that it was lawful for complainant to do so.

13

Prior to and at all times during the period of this contract R. F. C. knew that the complainant was and had long been regularly engaged in the established practices and capacity as a coffee Roaster, and that it was the established practice of all the Roaster industry to acquire green coffee from established domestic sources of supply in order to wholly or partially meet the needs of individual coffee Roasters for green coffees; that some Roasters regularly imported for their own use as Roasters a part of their green coffee requirements and consequently were lawfully possessed of dual capacities both as Roasters and as Importers; that the Roaster's selling price of processed coffees was not in any respect affected by the manner, source, or mode of distribution by which the Roaster obtained green coffee for his use as a Roaster; that some Roasters imported none of their green coffee supplies. At all times the normal and established flow of green coffee is, from the foreign country to the Importer, to the Roaster, to (after processing) the consumer outlets.

14

This contract was first modified after 4 months operation thereunder, on March 19, 1946, and finally on May 7, 1946. No consideration was expressly provided by either of the modifications, beyond that set out in the original contract, for complainant's refraining from or electing whether, or to what extent, its long established Roaster practice would become prejudiced by, or for any change or diminution in its continuation of such established Roaster industry practice of regularly acquiring part of its green coffee as a Roaster, from domestic sources of supply and without preju-

dice thereby, as distinguished from its direct importations of a part of its green coffee requirements in its separate capacity as "the Importer" "engaged in the importation of green coffees."

15

The lawful continuation by ALL Roasters equally and alike of the established Roaster industry practice of acquiring all or part of their green coffees from Importers would not tend to defeat or circumvent the Act or the green coffee import program; but would aid in restoration and stabilizing the total green coffee inventories and the normal flow and volume of distribution and production into continental United States, for the Roasters compose the only normal market and outlet for green coffee imported by the Importers. Green coffee in the continental United States serves no economic purpose or benefit until it has been acquired by or made available to a Roaster for processing and distributing into consumer channels. Originally and as modified the contract provided for the subsidy upon importations by "the Importer" (which subsidy all parties knew to be in reimbursement of costs previously incurred by the Importer), upon the accomplishment of his specific importations of green coffee within the provisions of the contract.

16

No import subsidy could become payable to the complainant unless, (1) such green coffee had been *both purchased by the Importer and loaded* on board a *carrier for continental United States* for the importer's account, not later than June 30, 1946, (modification of March 19, 1946), and (2) such importations were actually so accomplished *by the Importer* not later than August 15, 1946 (modification of May 7, 1946).

17

The original contract defined "carrier" as an ocean going vessel *in a foreign port on which coffee is loaded, with an on-board bill of lading for shipment to the continental United States,* and a freight car in a foreign country on which coffee is loaded *destined for a point in the continental United States.* This definition was never changed.

18

The complainant agreed to suffer forfeiture of subsidy in the event of violation of any law or lawful regulation or order applicable to the sale or distribution of coffee, including reasonable inventory and equitable distribution thereof. W. F. O. 146 (11 F. R. 3785) was promulgated and *remained in effect without lapse* until long after June 30, 1946, which was the *last date under this contract* for the purchase by the Importer of subsidized green coffees in a foreign country. This order expressly defined a Roaster, and it applied separately to, and provided for 3½ months supply as the reasonable quantity of inventory which *any Roaster capacity could lawfully have on hand regardless of whether such inventory was imported or acquired from domestic sources,* and for 1 month's supply which any Importer capacity could lawfully have on hand. It did not prejudice the lawful continuation of, and it recognized the distinction between, the lawful Roaster industry practice and the equally lawful but separate Importer capacity.

19

No accusation of violation has at any time been asserted against the complainant.

20

From the inception of the original contract, the complainant continued to engage in the lawful Roaster industry practices. It also engaged in the lawful importation of green coffee as described and provided for within the original and modified contract. At the terminal point of this contract, *at least 688 other Roasters in the continental United States* had on hand a substantial quantity of coffee economically in all things identical with complainant's non-imported, non-subsidized, Roaster class of inventory (total of more than 1,000 Roasters, maximum of 312 Import contracts including some Roasters who also import). None of the Roaster class of coffee in the hands of any of these 688 other Roasters was ever subjected to any prejudice by recapture or otherwise similar to the recapture sought by R. F. C. herein against the identical Roaster class of coffee

of the complainant. Approximately 40 of these 688 Roasters are in complainant's immediate home area and are directly economically competitive with complainant. As the result of R. F. C.'s interpretation of the purpose, intent and provisions of the Act, the Directive, the original and modified import contract with complainant, the Roaster class of non-imported, non-subsidy coffee in complainant's hands suffered a disadvantage of 3¢ per pound prejudice in comparison with identical competitive class of coffee in the hands of many other Roasters for identical economic use and purposes.

21

Complainant could relieve himself of the recapture prejudice as to such identical non-imported, non-subsidy Roaster class of coffee only by selling at the old (April 1, 1946) O. P. A. ceiling price between June 30 and August 14, 1946, although, as "the Importer" he had to expend this entire 3¢ per pound ($79,059.36) in order to accomplish the importation *of equivalent imported coffees,* while the many competitive Roasters were free to sell the identical class of Roaster inventory without penalty, *at uncontrolled prices between June 30, 1946, and July 25, 1946, and at the same O. P. A. price as the complainant at all times theretofore and thereafter.*

22

At the termination of the contract R. F. C. withheld from the complainant's earnings from its proper accomplishment of actual importations, the sum of $11,811.36 (293,212 pounds) at 3¢ per pound by reason of Roaster class, non-imported, non-subsidy coffees which complainant had in its Roaster inventory at the end of the contract, but as to which coffees (2,241,600 pounds) complainant had not imported nor performed any of the activities, conditions or requirements as set out or described in the import contract, at any time and upon which complainant was not entitled and did not receive any import subsidy; such class of coffees having been acquired by complainant as a Roaster, from usual domestic sources of supply in the same Roaster industry practice and manner for the same economic pur-

poses and at the same lawful costs therefor *as did all coffee Roasters,* without regard to whether any other Roasters were or were not also lawfully possessed of dual capacities as Importers or had R. F. C. import subsidy contracts.

23

$44,466.84 of the above sum of $67,248.00 withheld by R. F. C. as above, at 3¢ per pound *is represented by such non-imported Roaster class of coffees so lawfully acquired by the complainant from domestic sources in the established Roaster industry practice as a Roaster prior to the first contract modification of March 19, 1946,* and, *$55,678.20* of such sum at 3¢ per pound, was so acquired by the complainant *prior to the second and final* contract *modification of* May 7, 1946. Complainant lawfully accomplished the *importation into continental United States* of sufficient green coffees within the provisions of its contract with R. F. C. to become properly entitled to $79,059.36 additional green coffee import subsidy in reimbursement of an equal expense incurred by complainant in the lawful course of such importations, except for R. F. C.'s interpretation herein complained of.

24

The complainant intended and agrees that the modifications obligated it to *repay* to R. F. C. 3¢ per pound, and has so repaid the sum of $110,135.27 represented by either, (1) coffees owned by and upon which the complainant had *accomplished the importation into continental United States* or, (2) coffees owned by and for which a *bill of lading covering shipment to the United States for the importer's account, had been issued in a foreign port,* which remained in the complainant's unsold inventory at the terminal date of said contract.

25

The lawful continuation without recapture prejudice of the established industry practice of all Roasters in acquiring all or a part of their green coffee from Importers in the same manner as they had done prior to this coffee import

program would not tend to defeat the purpose of such import program, but would tend to restore the normal flow of distribution and the normal building up of total green coffee inventories, in the United States, and such practice was not forbidden but was lawfully permitted to all Roasters alike under the terms of W. F. O. 146 regardless of whether any Roaster did or did not also import or did or did not have an R. F. C. import subsidy contract.

26

All the Roaster industry practices, (economic and mechanical functions) of the complainant at all times herein and for some 30 years prior hereto were in all things identical to the traditional practices of all other Roasters. *The only difference between the practices of all other Roasters and the practices of the complainant in this case is the mere matter of degree or extent.* Complainant indulges in such practices by which its Roaster class of inventory is obtained only to a lesser extent than do those Roasters who procure all of their coffee as a result of such practices. The *recapture prejudice complained of* in this case *is confined to all Roasters including the complainant.* It is not disputed that as to the Roaster class of coffee concerned in this case complainant is and has always been a Roaster exactly as and identical with all Roasters.

27

The size, volume of business, area covered or degree or extent of established industry practice of any Roaster or any Importer were not directly or indirectly made the basis for the program, Directive or the import contract. These factors did not affect the intent of the contract or the consent of the complainant.

28

The only classification or qualifications concerned were solely such as constituted of the complainant "the Importer" "engaged in the importation of green coffee," and, as to such Importer status and the Importer class of inventory and the recapture thereupon complainant

makes no complaint, because it is and has been treated equally and alike with *all Importers!* But as to complainant's equally lawful Roaster status, practices and class of inventory the complainant is not and has not been treated equally and alike with *at least 688* out of the total of 1,000 other Roasters who are situated identically with complainant as Roasters and as to such class of coffee and industry practices.

29

The import subsidy contract and modifications were prepared by R. F. C. At no time prior to termination of the import subsidy contract did complainant ever understand, nor did R. F. C. ever advise complainant that R. F. C. intended by such import contract to prejudice any of the complainant's continued lawful Roaster industry practices or any Roaster class of coffee derived from such established Roaster industry practice. At no time prior to termination of this import contract was complainant ever advised or informed nor did complainant ever so understand, agree or consent, that the purpose, intent or effect of its R. F. C. import contract was intended to restrict, limit, prejudice or diminish complainant's continuation of the lawful traditional Roaster practices upon the same basis and to the same effect as and equally with all other Roasters without prejudice thereby.

30

Complainant did not knowingly understand, consent or agree that the intent, purpose or effect of its performance of its R. F. C. import contract equally and upon the same basis as all other Importers was intended to prejudice complainant's equally lawful Roaster practice unequally with, and to complainant's disadvantage in comparison with all other Roasters engaging in such identical industry practices and economically competitive with complainant's identical class of coffee.

31

The effect of R. F. C.'s interpretation of complainant's import contract is equal and alike as between complainant and all other Importers, but is unequal and to plaintiff's

substantial disadvantage as between (a) complainant and all other Importers who are not also Roasters, and (b) as between complainant and many other Roasters economically identical with complainant and who had a substantial quantity of the same class of coffee as the complainant but who were not also Importers.

32

No consideration was ever passed between the parties beyond that set out in the original contract.

33

Under R. F. C.'s interpretation, the only possible way the complainant could relieve its Roaster class of non-imported, non-subsidy coffee from the prejudice of 3¢ per pound ($79,059.36) was to sell such class of coffee between June 30 and August 14, 1946, at O. P. A. fixed prices prior to increase therein. None of the substantial quantity of identical class of non-imported, non-subsidy Roaster class of coffee in the hands of more than 688 other Roasters economically identical and competitive with complainant but who did not also import, was ever subject to such or any similar prejudice or requirement whatsoever.

34

The term "the Importer" and the term "the Roaster" are not and have never been synonymous in the coffee industry. In the coffee industry *the practice of the Roaster in acquiring green coffee from domestic sources of supply including other Roasters and Importers is not and has never been known, understood or referred to as being the same as "importation of green coffee" or importing.* In the coffee industry the term "the Importer" does not and has never meant, identified, signified nor implied the acquisition of green coffee from any domestic source of supply but has always meant, identified and signified the singular activity of actual importation and the specific coffee actually imported consequent of such activity. In the coffee industry all contracts and transactions relating to green coffee are

and have always been commonly known, used and interpreted in all things in full accord with the above and foregoing distinctions.

35

In the coffee industry the term, "types of coffee" has traditionally meant and still indicates and refers generally to the characteristics of the particular coffee beans, such as, hard, soft, mild, earthy, acidity, etc. It customarily relates to the place of origin or growth, for such coffees naturally have certain inherent known characteristics as distinguished from coffees grown in other localities.

36

Complainant timely made proper claim for the total of all sums earned by it as the importer of all coffee received by it in the continental United States within the requirements of its import subsidy contract herein. R. F. C. has paid all subsidy due and claimed by complainant except that involved in this controversy.

37

Except for R. F. C.'s interpretation of its contract as amended so as to assess recapture prejudice upon complainant's non-imported, non-subsidy Roaster class of coffee which *was not* imported by complainant during or within the Contract, complainant would be properly due and lawfully entitled to receive the sums herein sought by complainant.

38

Since the controversy involves primarily interpretation of the contract and intent of the parties, upon timely presentation of complainant's contentions, protests and express claims herein to R. F. C. it was agreed between R. F. C. by the Honorable John D. Goodloe, its Chairman of the Board, and Samuel H. Peak, as counsel for complainant, that R. F. C. would defer its final consideration of and action thereupon pending the action of the United States District Court at Houston, Texas, in a Civil Action filed therein by complainant, and that no prejudice should result to complainant by reason thereof, but that R. F. C.'s final

consideration, determination and action upon complainant's protest herein would be made and had as necessary subsequent to the determination by said United States District Court.

39

The United States District Court at Houston, Texas, having now lawfully determined that it is without jurisdiction to hear and determine the claim of this claimant or the merits of the controversy in these premises, and having so entered its judgment accordingly on the 15th day of November, 1948, complainant here in accordance with its agreement with R. F. C. as aforesaid, completes its protest procedure and amendment thereof and files the same with R. F. C. and now accordingly requests R. F. C.'s consideration hereof and final action hereupon, and the payment to complainant of the same withheld by R. F. C. from complainant by reason of complainant's lawful Roaster class of its non-imported, non-subsidy coffee in complainant's inventory at the termination of said green coffee import subsidy contract and which coffee complainant had so acquired, (a) prior to the original contract, (b) prior to the first modification, (c) prior to the final modification, and, (d) prior to expiration of the contract as amended.

DUNCAN COFFEE COMPANY,
Complainant,

By PAUL E. TAFT,
Assistant to the President.

THE STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared Paul E. Taft, known to me to be the person whose name is subscribed hereto, and who after being by me first duly sworn, upon his oath states:

My name is Paul E. Taft. I am a resident of Houston, Harris County, Texas. At all times pertinent to these premises I was and am employed by the Duncan Coffee Company in the capacity of Assistant to the President and a part of my responsibility and duties includes all matters having to do with the acquisition of, and transaction of the

Duncan Coffee Company's business relating to green coffees whether imported or whether acquired by it as a Roaster in the course of traditional industry practices, from domestic sources of supply. I am personally familiar with the established coffee industry practices including those of the Roaster and those of the Importer. I have been engaged in the coffee business for many years and I am presently a member of the Board of Directors of the National Coffee Association of the United States which is composed of those individuals and firms engaged in the coffee business and representing approximately 90% of all of the Coffee business in the United States.

I have read and understand each and all of the foregoing facts from number one to number thirty-nine inclusive. To my personal knowledge each and all of the same are true and correct in all respects and particulars. Wherever specific quantities relating to any class of inventory or specific amounts or sums are set out, mentioned or referred to in the above recitation of the aforesaid facts, such quantities and such sums are true and correct to my personal knowledge and are in full agreement and accord with the books and records of the Duncan Coffee Company. Such books and records at all times herein as the same pertain to each and all of the foregoing facts were at all times herein and are now, originated, kept and the entries thereupon are made and established either by me personally or directly under my direction, supervision and control. This affidavit is made, executed and delivered by me for the express purpose of verifying under oath and furnishing proof to the Reconstruction Finance Corporation, of the accuracy and correctness of each and every fact as the same is hereinabove set out and related herein.

PAUL E. TAFT.

Sworn to and subscribed before me this the 7th day of December, 1948.

FLORENCE CANNAN,
[SEAL.] *Notary Public in and for Harris County, Texas.* (Florence Cannan)

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STATUTES

Emergency Price Control Act of 1942, as amended (50 U.S.C.A. App. 901 et seq.):

56 Stat. 23,765, 58 Stat. 623, 59 Stat. 306, 60 Stat. 664:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,

Petitioner,

v.

RECONSTRUCTION FINANCE CORPORATION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

PETITIONER'S REPLY BRIEF

The opinion of the Emergency Court of Appeals (R. 16) is reported at 178 F. 2d 926.

Jurisdiction

Section 204 (d) (50 U. S. C. A. 924) Emergency Price Control Act of 1942 as amended, provides for petition for certiorari in the Supreme Court of the United States within thirty days after entry of judgment of the Emergency Court of Appeals. The judgment of the Emergency Court of Appeals was entered December 16, 1949 and petition herein was accordingly filed January 14, 1949 (Emergency Price Control Act 56 Stat. 664; 50 U. S. C. A. 901 et seq.).

Questions Presented in This Reply Brief

1

Whether the coffee roaster as such, under the import subsidy contract and the law from which the contract arises, is plainly obligated to repay to respondent on terminal inventory coffee acquired from importers as such, and from other roasters in the exercise of established roaster industry practices equally and alike with all roasters, some of such coffee having been so acquired from such traditional domestic sources prior to the import subsidy program, some during the import contract period prior to amendment, and the remainder subsequent to amendment of the import subsidy contract and prior to expiration thereof (R. Br. 2).

2

Whether it is discriminatory to compel payment of 3¢ per pound on identical inventory serving identical economic purposes obtained and held under identical inventory quantity, cost and selling price controls, on the coffee of one roaster as such, acquired, equally and alike in the exercise of identical established roaster practices, while many other competitive roasters having a substantial quantity of identical inventory suffered no such payment, merely because the management of such roaster is integrated with the management of the separate and different function of a coffee importer as such (R. Br. 15).

Statement

From the respondent's brief it appears that his defense is essentially predicated upon three somewhat overlapping contentions.

1

First, that the language of the import subsidy contract unequivocally compels payment by petitioner of 3¢ per pound to respondent upon petitioner's coffee acquired by petitioner in its exercise of the established roaster industry distribution practices, as a consequence of petitioners having also exercised within an integrated management the separate and different established traditional industry practices of an importer of green coffee.

2

Second, the respondent contends that the formal language of the contract by which petitioner is identified as "hereinafter known as the importer" (R. Br. 12), prejudices petitioner in its equal competitive traditional exercise of its established roaster industry practices essential to the established distribution of coffee, and which practices are traditional to all roasters as such regardless of whether any roaster did or did not operate under an integrated management with that of an importer as such.

3

Third and finally, respondent contends that under the facts, the law and the contract its enforcement of payment or repayment of 3¢ per pound upon petitioner's roaster coffee acquired by its continued exercise of the identical and traditional established roaster industry practices equally and alike with all roasters as such, both prior to and during the period of the import contract, is not discriminatory against the petitioner's roaster inventory or roaster industry practices. Respondent's contention is to say, the mere fact that the petitioner's management is integrated in the performance of its established roaster

industry practices with that of the performance of petitioner's established importer industry practices while many competitive roasters as such are not so integrated, is sufficient to assess $79,059.36 prejudice to the petitioner's roaster practices which it performed while it was also performing under this import subsidy contract the separate and different established practices of the coffee importer industry, notwithstanding the fact that its such roaster practices were traditionally equal, alike, identical and competitive with all roasters as such regardless of integration.

Argument

If it is chosen to disregard all of the respondent's admissions and all the uncontradicted proof, the law under which this import subsidy contract arises, its purposes and intent, the original contract language, its purposes and intent, the entire atmosphere in which this undertaking was premised including the known established traditions, understanding and conduct of the industry to which the performance and purposes of this contract expressly relates, and to confine the interpretation to the strictest possible construction of paragraph 14 of the amendment here in question, it then might appear at first consideration that such language could be construed as a veiled forfeiture, prejudice or peril attending petitioner's continued lawful exercise of the traditional roaster industry distribution practice equally and alike with all roasters as such, of acquiring green coffee from importers who had imported it into continental United States. Such construction would then bring about the result here contended for by respondent and substantially the same result as that produced in the meat subsidy administration by what is known as the "ownership and control" clause which was expressly provided for in the meat subsidy

regulations but not so expressly provided for in the green coffee subsidy program.

Any consideration of the language of the contract amendment in question to determine whether that language clearly prejudices the continued exercise of the roaster industry practices by one who with equal sanction of law and tradition also holds an importing contract, necessarily must consider its elements and attributes which distinguish and identify the roaster from the importer. It is obvious that functionally and factually it is clearly shown that there is a traditional distinction between the two, whether integrated or not.

The roaster as such has no functions of importing. He is the customer of the importer. As to the roaster's manner of acquiring green coffee, the language used in the amendment in question "which the importer owns in the continental United States or for which a bill of lading covering the shipment to the United States for the importer's account has been issued in a foreign port," (R. 51; Br. 15, 16) is wholly surplusage for the simple reason that the established traditional roaster practice does not and never has included any characteristic of importing. On the contrary, the roaster as such—all roasters equally and alike—traditionally acquire only from those who do engage in importation and who therefore, are known as "the importer".

Traditionally it is commonly known that there are those enterprises whose functions are confined singularly to importing or to roasting, and there are also traditionally those enterprises who perform to a greater or lesser extent in both the roaster status as such and the separate and different status of the importer as such under an integrated management. This green coffee import subsidy program if valid under any concept is necessarily a production sub-

sidy by virtue of the requirements of law essential to validity. It is predicated upon the conception that while green coffees are not produced within the United States, nevertheless, the act of producing the same within the requirements of validity is performed by, and only by, the importer whose conduct and functions result in green coffees being brought or imported into the United States. Therefore, the importer is said to be the producer of green coffee in the United States. Can the mere purchase by the roaster as such, regardless of integration, from stocks or inventories already present in the United States having been imported by the importer, then be said to be the equivalent of production? Obviously the roaster whose traditional industry practice and whose performance of his essential place in the distribution of green coffee is limited to his acquiring the same from domestic stocks after importation is accomplished, cannot be logically nor reasonably said to be thereby performing an importer function any more than he can be said to be the importer of coffees which he does not import and on which he could not claim or receive subsidy.

The law out of which this contract arises, the original contract as well as the amendment in question all arise in an atmosphere of the unusual economic circumstances then obtaining. But the traditional practices of the particular segment of the coffee industry to which the performance of the importer purposes of this contract relates, involved only the employment of the established practices of those having historically performed such practices and who thereby were identified as green coffee importers. Yet this was not an undertaking between personages traditionally common to green coffee imports any more than it was common for such importers to receive a so-called subsidy from the government. In fact, the industry had experienced no previous government subsidy incident to importations. In

this situation the government called upon the importers as such and did not call upon the roasters whether integrated or not to exercise any function or to effect any departure from the established roaster practices of acquiring green coffee from the importers. In fact, just the contrary was clearly intended by the purposes underlying the law itself which were to restore and stabilize normal distribution. One has but to read the original contract to appreciate the singular absence of any reference or implication of its being concerned with such roaster practices.

The identical law intended that the authorities exercised thereunder should contribute to rather than further confuse or confound established industry practices of distribution and costs. (50 U. S. C. A. 902(h)). The reasons for this intent harmonizes with economic reality. The roaster as such being essential to any stabilizing effort, for the reason that the importer as such sells his coffee to the roaster. Without the roaster's purchases from the importer there could be no normal distribution of the green coffee. Therefore, neither the law, the original language of the contract nor the language of the amendment in question provided or intended that this essential distribution practice of the roaster as such was to be jeopardized, work a forfeiture or carried on at the roaster's peril as a consequence of this importing program. To say that this established distribution practice of the roaster as such, whether integrated or not, was to become burdened for the first time in history, is to say that those roasters who as such exercised such practices to a lesser extent than do others must henceforth engage in such traditional roaster industry practices at their peril. It is to say that the distribution is to be further confused and confounded from the importer's perspective because he may lose a portion of his customers to whom he traditionally sold his imported coffees. It is to say from

the perspective of the roaster as such whose management is integrated, that he continues such established roaster industry practice of acquisition from importers as such subject to peril or repayment with which his competing roasters engaging in identical practices, but to a greater extent, shall remain wholly free of burden and shall continue to exercise such practices but with a 3¢ per pound advantage in value.

Respondent's contention would apply at once both the brakes and the accelerator. It would not contribute to the efficiency of the engine. The purposes of the import subsidy program and of the law could not be effectively furthered by introducing a new change in the established distribution practice of the roaster whether the management of such roaster practice was or was not integrated with that of the importer practice. The law does not speak against integration. The contract does not speak against integration. If the business practices are established and traditional to the industry in which integration of management is common and traditional the law does not except from its protection the enforcement of burden not previously characteristic to such established roaster practice, distribution and cost consequence.

It must be kept in mind that at all times pertinent WFO 146 (11 F.R. 3785) quantity inventory and equitable distribution controls, and the OPA purchase price and selling price controls applied equally and alike to all roasters as such and equally and alike to all importers as such. The same law and intent underlies the contract here involved. It is singular that the term, "the importer" as used in the contract is inseparable in concept from the express qualifications of the contractor which describe his functional identity as being the importer as such who is and has been regularly engaged in the importation of coffee and who

in such importing capacity had an import quota as such, established under WFO 63 of the Department of Agriculture (R. 41). Notwithstanding the frequent usage of the term "the importer" there was no indication or implication of intent to extend or broaden the purport or effect thereof beyond the engagement in importations of coffee, and over into the established practices of a roaster as such until the last amendment came to be interpreted by the respondent after performance of the importations by the importer. Only then did the respondent make known clearly its intent to belatedly affix the forfeiture or the peril consequent of the continued exercise of roaster practices contrary to and not previously characteristic of the industry.

50 U. S. C. A. App. 902 (h), Section 204 (b) Emergency Price Control Act, clearly shows that the conditions attending this green coffee import subsidy contract *shall not* be such as to inject a burden not characteristic of the industry, except where such action is found to be necessary. It has been shown that there could be no necessity for burdening the established practice of the roaster industry or that part of it which traditionally operates under integrated management. It has been shown that the roaster industry practices including that segment operating under integrated management, is essential to normal distribution of the green coffee after it has been acquired and imported into the United States by the importer thereof. It has been shown that such burden in common sense could only further confuse and confound and would not contribute to the restoration or stabilization of normal distribution or economy. We respectfully refer respondent to its admissions in regard to such practices having been traditional to petitioner and all roasters equally and alike and with regard to the essentiality of such practices in normal distribution of green coffee in the United States.

As an example of the inevitable effect which respondent's interpretation would have upon distribution, let us assume that petitioner as a roaster normally acquires 10,000 bags from importer B from time to time during the course of a specific period. Assume that roaster A being competitive with petitioner as a roaster, under the same period likewise acquires a similar quantity from the identical importer. Roaster A is not integrated with the management of any importer as such. Each roaster under WFO 146 is allowed an identical quantity of inventory. Out of this each must compete with the other. The OPA controls are such that each roaster is governed by the identical ceiling purchase price in his acquisitions from importer B and each roaster is likewise limited to the identical selling price which he may receive for coffees sold by him. Let us assume that each roaster at the terminal point of this program had 5,000 bags of coffee in his roaster inventory which he had acquired under the above conditions from domestic sources on which neither roaster could receive subsidy. Respondent enforces the repayment on such identical inventory of identical economic and competitive significance, by petitioner in the sum of $39,000. Roaster A has no burden whatsoever yet both roasters have engaged in the identical established industry conduct and the conduct of each is of identical economic purpose and significance. Since the law and the contract did not propose to change the nature of our competitive economy but rather sought to restore and stabilize the same, can it be assumed that it was the intent of the law or the contract to expect petitioner to proceed with its established roaster industry practices as before such burden and peril was ingrafted thereon? Is the law so blind to economic reality as to anticipate that such a competitive burden and radical departure from established business practices of the roaster as such would contribute to the

stabilizing or restoring of normal distribution? (*Genser* v. *R.F.C.*, 169 F. 2d 141, par. 5).

The result cited in the example is exactly what respondent's interpretation would cause. Yet, respondent admits that the petitioner had to first expend a sum equal to the subsidy on its imported coffee and has repaid all that was due on imported inventory. So there is no windfall or profiteering on imported inventory. OPA purchase and selling price controls applied to all activities equally. WFO 146 gave him no advantage in any respect as to quantity of inventory. All this, regardless of integration. Therefore, he ends up with an industry practice and distribution drastically changed and burdened far in excess of any price control. Respondent's interpretation should be said to constitute profit control to the extent of $79,059.36 *minus*.

Certainly the language of the concluding sentence of paragraph 14 cannot fairly be construed to plainly and exclusively extend the importer's burden over into the established traditional practices of the roaster as such whether integrated or not. The contract provides for the loss of import subsidy as a penalty for violation of certain of its terms and conditions. It is said that the concluding sentence of paragraph 14 would be meaningless if petitioner's traditional roaster practices were not burdened when integranted under the same management as the importer practice. Respondent forgets that an equally logical and controlling meaning and effect of such language could be that the importer as such could not be required to repay a greater sum than he had received as subsidy, if the importer's terminal inventory included coffee on which his claim for subsidy had been forfeited or denied by reason of some violation. Surely such language is less than plain and clear draftsmanship which might support a forfeiture.

Respondent in the footnote on page 11 of its brief attributes significance and states that petitioner is the only member of the industry which has challenged its interpretation and brought suit. The respondent well knows that it has threatened suit in many analogous and similar situations and has indicated of its own volition that it was deferring therein only to await the outcome of petitioner's suit.

In a further footnote on the same page of its brief respondent has difficulty in determining why petitioner refers to the "importer's inventory". The reference is not of obscure origin. The language of the amendment in question (R. 51) in effect refers to the importer's inventory and describes the inventory concerned to be that inventory which the importer owns in the continental United States or for which a bill of lading covering shipment to the United States for the importer's account has been issued in a foreign port. Therefore, since the importer as such could not have inventory in the continental United States without having imported it, and since the roaster as such traditionally engages in no importations and has no qualifications or quota identifying him as the importer intended by the contract, the inventory intended and described by the contract and the amendment could not be such inventory as was already in the United States when the roaster acquired it. The contract did not require as an eligibility qualification or as descriptive of the functions covered, that the importer is and had been regularly engaged in the established practices of a roaster in acquiring coffees from domestic stocks of those who had imported the same. From this it becomes compelling that the inventory upon which repayment was intended to be enforced was that of the importer who had imported it or who had a bill of lading issued in a foreign port and who had not at the terminal point sold it to the roasters at the OPA price prior to increase.

At page 12 respondent's brief endeavors to show that initial formal contract reference to the parties is such as to clearly extend the $79,059.36 burden to the exercise of the established traditional roaster practices when such practices are engaged in by a roaster as such whose management is integrated with that of an importer. Respondent argues that the term "the importer" is unequivocably sufficiently broad to include the fixing of this 3¢ per pound burden for the first time in history, as a consequence of the continued lawful exercise of the roaster industry practices during the period of this import contract, if the management of such roaster practices as such is integrated with the separate and different established practices of the importer as such. If such a change in the established industry practices and distributing can be construed in the vague premise of such language, then there is contrarily no need for the preciseness of the meaning ascribed the use of language in the course of interpreting regulations and orders arising from this identical law, such as that which is seen in WFO 146 (11 F.R. 3785) where the distinction between the importer and the roaster is clearly recognized and binding upon all segments of the industry equally and alike with respect to the quantity of inventory permitted each roaster as such and each importer as such and providing for equitable distribution among all. Such an interpretation would likewise be contrary to the recognition of the distinction afforded by similar language between the importing status as such and other integrated functional activities as declared upon and upheld by the lower court in the *Booth Fisheries* case (153 F. 2d 449) where it was held that a price regulation arising under this identical law could not be construed to apply to the complainant consequent of the complainant's integrated activity in a segment of the industry which did come within the higher price regulation which the Administrator sought

to enforce, and in the *Electromatic Distributors* case (162 F. 2d 212) in which the same court held that in fact and reality one was not a manufacturer who had not manufactured the commodity in question but who had in fact imported such commodity, notwithstanding the fact that traditionally he was a manufacturer and integrated. If such interpretation should prevail as the respondent contends for by virtue of this veiled language, the uncontradicted proof shows without question that it will be contrary to the traditional coffee industry usage and will produce synonymity in the industry practices and significance of the terms "the importer" and "the roaster" for the first time in the history of the coffee industry (P. Br. app. 37-58 inc.; R. 134-137 inc.; R. 4-17 inc.).

Petitioner does not seek to have this contract rewritten. It seeks to have it interpreted in the light of those essential elements and premises making up the extraordinary circumstances out of which the law and this contract arose, all of which would be disregarded and excluded by respondent who would also totally disregard its own admissions with respect thereto as well as the uncontradicted evidence.

Respondent in a footnote at page 13 of his brief attaches significance to a presumption that the subsidy had been paid, which was contained in an amendment to Directive 87 and which was not incorporated in the amendment to the contract in question in this case. The fact that such presumption was deliberately left out of the contract amendment in question is entirely harmonious with the necessity that this import subsidy be a production subsidy as such, and therefore, only producers (importers as such) were eligible thereto. It further clearly shows that the particular inventory upon which the repayment was to be enforced was indeed that inventory which had been produced (imported) by the importer, who was required by the contract

to be regularly engaged in the importation of green coffee and have a quota of permitted importations assigned to him by the Department of Agriculture under WFO 63, and that in the exercise of such importing qualifications the importer had to accomplish actual importations instead of presuming importations. The requirement of law that this be in fact a production subsidy could not be met by the device of presumption. Lastly, the fact that presumption was not indulged in in the contract amendment in controversy would be more significant than the mere fact that at one time prior to the amendment of the contract the presumption did exist. (*Genser* v. *R.F.C.*, 169 F. 2d 141, par. 5).

Respondent in the footnote at page 13 of its brief indicates necessity for pursuing the coffee from the importer into the hands of the roaster (only if the roaster as such is integrated with the management of the separate and different importer status) upon the possibility of manipulation to circumvent. This is rather a naive argument. It is apparent and notorious that the government was not without means of preventing and punishing evasion and that it required the solemn oath under severe penalty almost universally in any such relationship. This argument is to say that all roasters upon whom the stigma of integration can be affixed are assumed to be guilty of unlawful intent, and that many shall be punished for the one who may in the future be guilty. This argument also overlooks the critical fact that the subsidy herein sought has been earned by accomplishment of importations, and which reasonably and necessarily required the importer as such to first expend an equivalent amount. It is mere reimbursement at most.

The mere presumption or statement of necessity by respondent at this late date does not show necessity for following the inventory from the importer into the roaster for

recapture only when the roaster is integrated. It must be remembered that the petitioner makes no complaint of its treatment as an importer and seeks no recovery of any part of its payment made upon imported inventory. But the control of profits of the roaster as such in the exercise of its traditional industry practices or the jeopardizing of its values consequent of the lawful exercise of such roaster industry practices is indeed farfetched, especially when realities of competitive economy are so plainly protected by the law. Profit control is not provided for as a purpose of this contract and was not mutually agreed upon and is obviously discriminatory against the few roasters who are integrated and in favor of the many who had substantial inventory on hand at the same time and who are economically identical and competitive as roasters with petitioner as a roaster.

Normal distribution and stability under any program would suggest and necessitate continuous activity in the established practices of both the importer as such and the roaster as such, reinvesting in competitive economy. It is commonly known that the cost of green coffee was increased and that OPA ceiling price controls applied upon each character of enterprise equally and alike regardless of integration until long after this contract and program had expired. Respondent's effort now to exercise profit and value control over these roasters as such, not as importers but as roasters, and to do so by discriminatorily enforcing burden to the hitherto equally competitive factors of the roaster function as such and traditionally equal industry practices thereof, with no finding of necessity and in the face of respondent's admission that the roasters continued exercise of such practices was essential to the normal distribution, is hard for the petitioner to grasp.

It is difficult to reconcile respondent's argument with economic reality which the law in its expressions, purpose

and intent took into account and which the lower court took into account and upheld in the Booth and Electromatic cases, supra, while at the same time recognize the obvious fact that the law and premise out of which regulations arose which have received interpretation supporting petitioner's contention as to the significance of the language of this contract and of its amendment in question, is the identical law, purpose, intent and unusual premise out of which this contract and its amendment arose. The law made no distinction between the purposes and intent of regulations as such and this contract. It made no distinction in the interpretation of such regulations and such contracts as arise from the identical source of law and intent and purposes thereof. To say that such a visitation of burden and discrimination was plainly discernible to the integrated roaster as such by the language of the law or this contract and amendment, and therefore such roaster by signing such a contract slipped his head in the noose of intentional mutual agreement, is almost so unreal as to attribute supernatural power of discernment to a coffee roaster. Petitioner confesses the same need for clarity and plain language as has so frequently been required of respondent by the courts.

The respondent finally contends at page 15 of its brief, that there is no economic community and no discrimination in its interpretation. Lastly, respondent indicates that the burden complained of may have come about through accident or as a war casualty not contemplated by the law under which this contract arises.

Such a conclusion is a singular misunderstanding of reality. Respondent apparently forgets WFO 146 quantity and equitable distribution control order, previously discussed, which made it utterly impossible for petitioner or any other roaster regardless of integration to have more coffee than such order permitted, the effect of which renders

economic identity to the inventories of all roasters as such. It forgets that OPA price controls renders further economic identity, conduct and practices of all roasters and to the price at which all roasters could sell, as well as identity to the price which all roasters equally and alike regardless of integration had to pay for such identical coffees. It likewise forgets that similar controls and limitations of the same nature were placed upon all importers as such without regard to integration. Respondent further forgets the critical and admitted fact that petitioner's roaster status coffee (being the only subject of this controversy) was of necessity purchased from the "middleman" who imported it, and that such purchase was upon the identical competitive basis and under identical economic controls as all roasters and therefore, the roaster industry practices and consequence thereof by the petitioner were subject to identical "middleman" profits as were the identical purchases of the admittedly substantial quantity of identical and competitive coffees by all the other thousand roasters in the country.

It is stimulating to note respondent's conclusion that the subsidy upon importations by the importer as such offsets the prejudice of discrimination against petitioners having engaged in its traditional roaster practices equally and alike until respondent came to the belated interpretation here complained of. Has respondent forgot its admission that the importer as such found it both necessary and reasonable to first expend its own funds equal to the amount of the subsidy received and sought, in accomplishing its importation?

In view of respondent's admissions and of the inevitable economic realities there could be nothing left of the so-called import subsidy with which petitioner could hope to "counterbalance" the obvious discrimination against

this roasters having continued the established industry practices, and, on which coffees incident thereto he could receive no subsidy because he was not the producer (importer), but which on the contrary be bought from other roasters and from identical domestic suppliers under identical competitive price and quantity controls and for identical economic purposes, the identical coffees as were held in substantial quantities by many other roasters as such.

Finally, in respect of respondent's novel conclusions as to economics, middleman profits and counterbalancing, it seems clear that not only is respondent blind to economic reality and identity and the inevitable admission of the roasters continued competitive activity and essential place in the traditional established distribution practice in so far as the same relates to any stabilizing effort, but it forgets also that the premise underlying this entire program and so clearly envisaged in the purposes of the law out of which this contract as well as regulations are authorized, favors and encourages a competitive economy which was indeed, the goal of all restoration and stabilizing effort. There is nothing in the concept of this green coffee import subsidy program authorizing respondent to forsake, by arbitrary and discordant interpretation, the fundamental principle that one roaster as such whose economic purpose, conduct and consequence is identical with that of all roasters as such without regard to integration, is entitled to rely upon interpretation in keeping with the known traditional practice of the industry and one which does not unnecessarily and without plain notice unequally discriminate to the extent of $79,059.36 against his lawful and traditional engagement in such industry practices. Indeed, respondent's interpretation is the hand of Esau but its voice is the voice of Jacob; it would now change its voice to overlook the economic facts and its

admissions and would disregard utterly the significance of the uncontradicted evidence; it would have its hands now change the fact of its inescapable discrimination and the consequences of petitioner's lawful continued traditional roaster industry practices as such equally and alike with all roasters. Respondent would cause further interference, confusion and confounding with the effort to protect and stabilize established distribution and cost practices of the industry by ingrafting a stigma to integration which stigma is in nowise provided for nor intended by law or the terms of this contract any more than a similar stigma was provided for or intended by the identical law in the case of regulations in the interpretation of which the identical stigma was rejected.

If there was law and reason in the premise underlying the equal and alike treatment accorded importers as such within this program, petitioner respectfully submits, the same law and reason must necessarily prevail against the demonstrative, unnecessary discrimination against any roaster who follows the established industry practices and distribution and who as a roaster is economically identical with all other roasters.

It is not disputed that respondent at all times was fully aware of the traditional existence of integrated management within the industry. And its failure to speak with the same clarity in the case of contract as it did in the case of regulations (ownership and control clause of meat subsidy) is now good reasoning, good law, and good conscience against its belated effort to impose burden not characteristic of the industry and to do so in a manner not consonant with the plain purposes and intent upon which its authorities are laid.

Its arbitrary discriminatory and capricious interpretation; its superimposition of this $79,059.36 prejudice are

no more well-founded against one roaster who is traditionally integrated but nonetheless a bona fide traditional roaster equal, competitively and alike with all roasters, than are respondent's enlightening attempts to show lack of economic identity, middleman profits and counterbalancing the funds which petitioner here seeks to recover and of which respondent would by such argument deprive the petitioner. Respondent's apparent conception of unconscionable windfall is as refreshing as it is removed from logical reasoning. Apparently in such reasoning respondent may have concluded that the petitioner has liquidated and gone out of business or may have such intent.

Conclusion

For the foregoing reasons and those submitted in its original brief petitioner respectfully submits, that it and the welfare of the industry in whose traditional practices it characteristically engages, have presented questions which warrant review, and that the petition for a writ of certiorari should be granted accordingly as prayed.

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(7750)

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 167) is reported at 178 F. 2d 926.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered December 16, 1949 (R. 176). The petition for a writ of certiorari was filed January 14, 1950. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, *infra*, p. 20, making applicable Section 240 of the Judicial Code, as amended (now 28 U. S. C. 1254).

QUESTION PRESENTED

Whether the Emergency Court of Appeals erred in holding that the plain language of the coffee subsidy contract between petitioner and the Reconstruction Finance Corporation authorized the recapture of subsidy on petitioner's entire terminal inventory.

STATUTE AND REGULATION INVOLVED

The pertinent parts of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664; 50 U. S. C. App. 901 *et seq.*, and the directive involved are set forth in the Appendix, *infra*, pp. 18–22.

STATEMENT

In 1945, green coffee was in short supply in this country due to war conditions and the demands for increased prices made by foreign sources of supply. To assure necessary coffee imports without increasing coffee prices to consumers, the Director of Economic Stabilization, by Directive 87 of November 23, 1945 (10 F. R. 14450) ordered RFC to subsidize coffee imports by paying 3 cents per pound for green coffee imported in accordance with the conditions of the Directive.[1]

[1] Section 2 (e) of the Emergency Price Control Act, *infra*, pp. 18–19, provided that subsidies might be paid upon material defined by the President as strategic or critical, upon the determination of the Federal Loan Administrator, with the

At the request of the industry, the subsidization program was effectuated through 312 substantially similar contracts between coffee companies and respondent (R. 168). The contract entered into between Duncan and the RFC was designated as Agreement No. 268 (R. 41). Respondent agreed therein to pay petitioner 3 cents a pound on a maximum of 11,946,580 pounds, purchased for import and received into this country within certain time limits. Paragraph 13 provided for modification by mutual consent at any time.

The contract was twice amended by mutual action. The first amendment (R. 49) occurred on March 19, 1946, and incorporated therein almost verbatim the provisions of Par. 1 (f) (iii) of Directive 87 of the Office of Economic Stabilization, as added by Amendment No. 2 of that Directive of the same date, *infra*, pp. 21–22. After increasing by more than 100 per cent the maximum amount of coffee that Duncan could import and extending the time for purchase of such coffee, the amendment added, as paragraph 14 of the contract, the following "recapture" clause (R. 49):

> In the event of an increase in OPA maximum prices on coffee, the importer shall pay to RFC an amount equal to the increase in maximum prices per pound on

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approval of the President, that they were needed to obtain the maximum necessary production thereof.

each type of coffee (not to exceed three cents a pound, green basis) times the number of pounds of each type of coffee which the importer owns in the continental United States at the close of business on the day prior to such increase in maximum prices, less the amount of such coffee which the importer has contracted to sell at a fixed price not to exceed the OPA maximum prices for such coffee in effect April 1, 1946, provided that the total amount of repayment to RFC shall not exceed the amount of payments by RFC to the importer under this agreement as amended.

The second amendment to the contract (R. 50) took place on May 7, 1946, following the language of Par. 1 (f) (iii) of Directive 87 as modified by Amendment No. 3 of May 6 to that Directive, *infra,* p. 22. It extended Duncan's time for arrival in this country of imported coffee and modified paragraph of the contract to read as follows:

> In the event of an increase in or removal of OPA maximum prices on coffee, the importer shall pay to RFC an amount equal to the equivalent of the increase in value of his inventory, computed as follows:
>
> a. The rate shall be three cents a pound green basis, or the increase in OPA maximum prices, whichever is lower.

b. The inventory shall include all types of coffee, measured in green basis equivalents, at the close of business on the day prior to such increase in or removal of maximum prices, which either the importer owns in the continental United States or for which a bill of lading covering shipment to the United States for the importer's account has been issued in a foreign port; provided that the total inventory shall be reduced by the quantity of such coffee which the importer has contracted to sell at a fixed price not to exceed the OPA maximum prices for such coffee in effect April 1, 1946.

c. The total amount of repayment to RFC under this paragraph shall not exceed the amount of payments by RFC to the importer under this agreement as amended.

On August 14, 1946, maximum prices on green coffee were increased by Amendment 16 to OPA Revised Price Schedule 50 (11 F. R. 8868) by $0.0832 per pound. Pursuant to this increase, respondent, in accordance with the provisions of paragraph 14 of the contract, adjusted a flat 3 cents per pound liability on each pound of coffee [not, of course, already contracted for sale at the former ceiling prices] in Duncan's inventory at that time (R. 170). This contractual liability, calculated on petitioner's entire inventory at the time and withheld from subsidy payments in the amount of $774,998.37 due Duncan, amounted to

$189,194.64.[2] Of this sum, $110,135.28 was attributable to coffee actually imported by petitioner (R. 170). The balance, $79,059.36, represented that part of the inventory which had not been imported by Duncan but which had been purchased by it from other importers (R. 170).

Duncan admits that respondent was entitled to recapture the sum of $110,135.28, adjusted on that part of the inventory imported by it and on which it had received subsidies (R. 170). Contending, however, that RFC had no right to recover the balance of $79,059.36, attributable to coffee which had not been imported by it and which it had acquired "in its role as a roaster" (R. 170), Duncan filed a protest with respondent in accordance with Section 203 (a) of the Emergency Price Control Act, *infra*, p. 19 (R. 80–81). Pending disposition of the protest (R. 81), Duncan instituted an action, substantially similar to the present suit, against RFC in the District Court for the Southern District of Texas (R. 77–84). That court dismissed for want of jurisdiction since the Emergency Court of Appeals was found to have exclusive jurisdiction of such complaints (R. 110). The district judge observed, however, that under the wording of paragraph 14 of the contract RFC

[2] Upon the termination of the subsidy program, Duncan had imported into this country 25,833,279 pounds of green coffee which, at 3 cents per pound, amounted to $774,998.37 in subsidy, all of which has been paid except the amount in controversy here (R. 108).

was "entitled to 'recapture' the entire [inventory] at 3 cents per pound, or $189,194.64, and if this Court had jurisdiction of this case, I would enter Judgment that Plaintiff take nothing" (R. 110). Duncan appealed from such dismissal to the Court of Appeals for the Fifth Circuit, which appeal has been stayed pending the outcome of the present action (R. 112).

Following the district court's dismissal, Duncan, on December 8, 1948, filed a second and amended protest with the RFC (R. 2). This protest was denied by respondent (R. 113). Petitioner then filed the present complaint under Section 204 (a) of the Price Control Act, *infra*, pp. 19–20,[3] to set aside respondent's order, urging that the subsidy recapture provisions of paragraph 14 should be construed as applying only to the imported portion of the inventory, not to that portion acquired by it "in its status as a roaster"; that respondent's interpretation was contrary to the purpose of the import subsidy program and to the terms of the contract itself; that such interpretation was prejudicial to its function as a roaster, which function was similar to and competitive with other roasters who had not entered

[3] The Emergency Price Control Act expired by its own term on June 30, 1947. However, Section 1 (b) of that Act, *infra*, p. 18, provides that the Act shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any rights accrued prior to the termination date.

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into the subsidy agreements and therefore were not subject to the recapture provisions (R. 117–133). The Emergency Court of Appeals sustained respondent's contention that the language of paragraph 14 plainly subjected Duncan's entire inventory at the time of the price increases to recapture, and accordingly dismissed the complaint (R. 167–176).

ARGUMENT

The decisive question in this case is the correctness of respondent's interpretation and application of recapture provisions in its coffee subsidy contract with petitioner. Respondent's order which embodies this interpretation and application may be considered presumptively valid (see *Montgomery Ward & Co.* v. *Bowles,* 138 F. 2d 669 (E. C. A.); *Armour & Co.* v. *Reconstruction Finance Corporation,* 162 F. 2d 918 (E. C. A.); *Barnett* v. *Bowles,* 151 F. 2d 77, 81 (E. C. A.), certiorari denied, 326 U. S. 766), and petitioner, seeking to overturn the order, carries a statutory burden of demonstrating by "strong and convincing" evidence that it was "not in accordance with law or [was] arbitrary or capricious, * * *." Section 204 (b) of the Emergency Price Control Act, *infra,* p. 20; *Madison Park Corp.* v. *Bowles,* 140 F. 2d 316, 326 (E. C. A.); see *Cudahy Bros. Co.* v. *Bowles,* 142 F. 2d 468 (E. C. A.); *Illinois Packing Co.* v. *Snyder,* 151 F.

2d 337 (E. C. A.).[4] There is, however, no necessity for resort to rules of presumption or burden of evidence in this case. The action of respondent here challenged is plainly correct as a matter of simple contract interpretation and the court below so held. We submit that there is no occasion for review of the decision below.

1. The language of paragraph 14 as amended is unambiguous and clearly authorizes respondent to recapture against Duncan's entire inventory, whether imported or not. It states (R. 51) that in the event of OPA price increases "the importer shall pay to RFC an amount equal to the equivalent of the increase in value of his inventory" computed at the rate of 3 cents a pound green basis or the increase in prices, whichever is lower. Such inventory is to be computed as of the date of increase in prices and is defined to "include all types of coffee, measured in green basis equivalents * * * which either the importer owns in the continental United States" or for which a bill of lading has been issued for Duncan's account in a foreign port. Then fol-

[4] Petitioner misreads or misconceives the plain language of Section 204 (b) and attempts to put the burden upon respondent by a groundless assumption that respondent's interpretation of the contract and consequent order is prejudicial to its roaster function (Br. 5, 7, 14, 33) and to the coffee industry in general (Br. 23, 25). Petitioner then advances the novel argument that RFC must show explicit authority in the contract for such prejudice (Br. 12, 15, 29, 30).

lows the qualification that "the total inventory shall be reduced by the quantity of such coffee" already contracted to be sold by Duncan at OPA prices in effect April 1, 1946. Thus, the importer, Duncan, is to pay RFC "an amount equal to the equivalent of the increase in value of his inventory"; such inventory is defined to "include all types of coffee * * * which the importer owns in the continental United States * * * provided that the total inventory" shall not include that quantity already contracted for sale at OPA prices. Such language admits of no other interpretation than that RFC was directed, in the event of price increases, to recover 3 cents per pound on Duncan's entire terminal inventory. The concluding sentence of paragraph 14 concludes all doubt: "The total amount of repayment to RFC under this paragraph shall not exceed the amount of payments by RFC to the importers under this agreement as amended." This language would be mere surplusage under petitioner's contention that it was the parties' intention to apply recapture only to imported coffee; for, in such case, petitioner's liability would necessarily have been limited to the amount of payments by RFC to the importer upon coffee imported under the agreement.

In the attempt to deny the plain meaning of paragraph 14 and thereby limit its liability to its "importer" inventory, petitioner contends (Br. 29–31) that RFC's interpretation of the

contract, and consequent withholding, was contrary to the intent of the parties. Petitioner asserts that respondent's interpretation, resulting in recapture on Duncan's entire inventory of coffee whether acquired in its capacity as "importer" or as "roaster," is the result of treating the words "importer" and "roaster" as identical, whereas, traditionally, the importer and roaster functions of coffee companies have been considered separate and the terms have never been considered synonymous (Br. 11, 15, 18, 21, 27).[5] Petitioner argues (Br. 21, 28, 30) that the word "importer" could not have been intended to include the "roaster status" of Duncan, that the real intent of the parties must be effectuated by considering the word "importer" appearing in paragraph 14 as meaning Duncan Coffee Company in its role as an importer, and not in its role as a roaster.[6] The conclusive answer to this is found in the opinion of the court below (R. 173):

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[5] It is to be noted that, despite Duncan's assertions as to its and the industry's understanding of the contract to the contrary (Br. 3, 18, 27, 30), petitioner is the only member of the industry which has challenged RFC's interpretation and brought suit against it.

[6] Throughout its petition (Pet. 3, 4, 6, 7, 11), Duncan, in arguing that its entire inventory is not liable, refers to the term "importer's inventory." The implication, presumably, is that the obvious meaning of the term and therefore of the contract is "inventory as an importer." As a matter of fact, the term "importer's inventory" nowhere appears in the contract.

> The contract itself recites that it is an "agreement * * * between Reconstruction Finance Corporation * * * hereinafter called RFC and Duncan Coffee Co. * * * hereinafter called the 'Importer'." This appears to be a clear, unambiguous expression of the parties' intention that the word "Importer", whenever it appeared in the body of the contract, shall mean "Duncan Coffee Company" and nowhere in the contract does there appear any provision which lends support to [petitioner's] contention that the word should be construed to mean "Duncan Coffee Company in its status as importer."

Moreover, the courts will not rewrite a contract in the absence of mutual mistake, fraud, or accident. *Manufacturer's Finance Co.* v. *McKey,* 294 U. S. 442; *Hedges* v. *Dixon County,* 150 U. S. 182, 189. Petitioner has not and cannot allege any such occurrence.[7]

[7] In a further effort to deny its contractual liability, petitioner argues (Br. 8–9) that respondent's contract interpretation is contrary to the purpose of Directive 87 of the Office of Economic Stabilization. Although the meaning of the language of the contract is so clear as to preclude any occasion for resort to extrinsic circumstances (see *United States* v. *Golden Gate Bridge and Highway District,* 37 F. Supp. 505 (N. D. Cal.), affirmed 125 F. 2d 872 (C. A. 9), certiorari denied, 316 U. S. 700), the language of paragraph 14, if resort to extrinsic facts be justified, should be read in the light of the recapture provisions of Directive 87, and not, as petitioner attempts (Br. 8), exclusively in the light of its importation provisions. The recapture provisions of

Clearly, therefore, the language of paragraph 14 and the rest of the contract required and fully supported RFC's interpretation, and its order was in no way contrary to law. Actually, petitioner's suit is merely an attempt, after having received full subsidy benefits, to avoid its plain duty under the contract. Petitioner "may not at the same time approbate and reprobate." *Burnes* v. *Burnes,* 137 Fed. 781, 801 (C. A. 8), certiorari denied, 199 U. S. 605; see *Gray* v. *Commodity Credit Corp.,* 63 F. Supp. 386 (S. D. Cal.), affirmed, 159 F. 2d 243 (C. A. 9), certiorari denied, 331 U. S. 842; *Keller* v. *Ashford,* 133 U. S. 610, 620.

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the May 6 Amendment No. 3 to Directive 87, *infra*, p. 22, incorporated almost *haec verba* into paragraph 14 as amended, provide that in the event of price increases the importer shall refund RFC "on all coffee which he then has in inventory on which the subsidy has been paid. For the purposes of this paragraph, the subsidy will be deemed to have been paid on all coffee which the importer has in inventory in the United States upon the termination of this program * * *." Clearly, therefore, RFC's order was entirely consistent with the recapture provisions of Directive 87.

Moreover, as a practical matter, it is readily perceived why it should have been the parties' intention that paragraph 14 embrace a contractor's entire inventory, both coffee imported by it and coffee obtained from other importers. Respondent could hardly recapture the subsidy from an importer upon coffee which the latter had sold the contractor and upon which it would not receive the benefit of increased prices. Further, the absence of a recapture provision as to non-imported coffee would have opened the possibility of manipulation and straw deals by the contractors so as to avoid recapture and yet receive the full benefit of the price increases.

2. Petitioner contends that RFC's order is prejudicial to its roaster function and to the coffee industry in general, and that it is inconsistent, therefore, with the Emergency Price Control Act the purpose of which is to stabilize and restore natural business functions (Pet. 4, 8, 9; Br. 34). In answer to this contention, suffice it to say that Section 1 (a) of the Act (50 U. S. C. App. 901 (a)) states that the purpose of the Act is "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency * * *." Such language clearly envisages respondent's action in preventing an unjustifiable windfall on the part of a contractor in the event of price increases. *Schluderberg-Kurdle Co.* v. *Reconstruction Finance Corporation,* 169 F. 2d 419 (E. C. A.), certiorari denied, 335 U. S. 846; cf. *Yakus* v. *United States,* 321 U. S. 414.

The assertions as to the prejudicial nature of the order, repeated (Br. 20–26) in connection with Section 2 (h) of the Act (50 U. S. C. App. 902 (h)), are equally without foundation. As to the argument (Br. 22, 25, 32) that RFC's interpretation discriminates against Duncan in its role as a roaster since competing roasters, who were not members of the subsidy program, are

not subject to any recapture, the court below said (R. 174):

> The answer to this is found in the contractual nature of the document being interpreted. If there has been any change in [petitioner's] business practices, and if [petitioner], in its roaster status, has been placed at a competitive disadvantage, it consented, in legal effect, to these changes when it signed the contract with respondent.

In the final analysis, Duncan's so-called roaster function was not discriminated against or prejudiced anyway. Despite petitioner's assertions to the contrary (Br. 29, 32, 33, 34), Duncan's "roaster function" was not "economically identical" with nonimporting roasters. That coffee which Duncan imported, roasted and then sold was not subject to any middleman's profit, whereas the finished product of a nonimporting roaster necessarily was. Further, the refund owed by Duncan on its quantity of nonimported coffee is more than counterbalanced, so far as nonimporting roasters are concerned, by the subsidies which Duncan has received on its imported coffee and which of course have not been received by the nonimporting roasters. Cf. *Armour & Co.* v. *Bowles,* 148 F. 2d 529 (E. C. A.), certiorari denied, 325 U. S. 871. Moreover, even if Duncan's "roaster function" were put at some slight economic disadvantages as a result of the

subsidy program, this fact would not render respondent's order invalid since RFC's action was necessitated by the complexities of wartime conditions and the imperative need for inflation control. Wartime orders, even though causing some individual hardship, are not thereby rendered invalid since "citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier." *Galante* v. *Commodity Credit Corporation,* 71 F. Supp. 963, 966 (S. D. Cal.); see *Counselman* v. *Fleming,* 161 F. 2d 203 (E. C. A.), certiorari denied, 331 U. S. 861; *Bowles* v. *Willingham,* 321 U. S. 503; *U. S. Gypsum Co.* v. *Brown,* 137 F. 2d 803 (E. C. A.).

Duncan's further contention (Br. 21, 23) that RFC's order is prejudicial to the coffee industry in general since it disturbs the normal channels of supply and therefore is in conflict with Section 2 (h) of the Act (50 U. S. C. App. 902 (h)) seems totally devoid of merit. Duncan has produced no evidence, in the words of Section 2 (h), of "changes in the [industry's] business practices, cost practices or methods, or means or aids to distribution * * *." Nor has petitioner shown that RFC, contrary to Section 2 (h), in any way has gone "beyond its price regulating function and [engaged] in an effort to reform business practices which were not directly related to prices * * *." *Philadelphia Coke Co.* v. *Bowles,* 139 F. 2d 349, 358 (E. C. A.); see *Safe-*

way Stores, Inc. v. *Bowles,* 145 F. 2d 836 (E. C. A), certiorari denied, 324 U. S. 847.

Paragraph 14, and respondent's interpretation of its plain meaning was in no way arbitrary or capricious, but was a reasonable means of avoiding an unconscionable windfall to petitioner.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the court below is correct and presents no question which warrants review. The petition for a writ of certiorari should therefore be denied.

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Solicitor General.

H. G. MORISON,
Assistant Attorney General.

SAMUEL D. SLADE,
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Attorneys.

APRIL 1950.

APPENDIX

1. The Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664; 50 U. S. C. App. 901 *et seq.*:

> SEC. 1. (b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.
>
> * * * * *
>
> SEC. 2. (e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon

such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided,* That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator with the approval of the President, * * *

* * * * *

SEC. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections * * *

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set

aside in whole or in part * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding * * *

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended. * * *

2. Directive 87, Office of the Stabilization Administrator, Office of War Mobilization and Reconstruction (10 F. R. 14450):

1. The Reconstruction Finance Corporation is authorized and directed to establish and carry out the following subsidy program with respect to imports of green coffee:

(a) The amount of the subsidy shall be 3 cents per pound (net shipping weight basis) of green coffee imported in accordance with the eligibility provisions of this directive.

(b) In no event shall any subsidy payment be made on any green coffee imported in excess of 6,000,000 bags of 60 kilograms each.

* * * * *

(e) The Reconstruction Finance Corporation shall require that each importer, as a condition of obtaining any subsidy payments under this program, agree:

(i) That he will not hold any inventory of green coffee in the United States in excess of a reasonable amount as defined by the Stabilization Administrator or an agency designated by him;

* * * * *

Amendment 2 to Directive 87 (11 F. R. 2994):

1. (f) The Reconstruction Finance Corporation shall require that each importer, as a condition of obtaining any subsidy payment under this program, agree:

(i) That he will not hold any inventory of green coffee in the United States in excess of a reasonable amount as defined by the Secretary of Agriculture in accordance with section 3 (b) of this directive;

(ii) That the coffee on which the subsidy is claimed will be sold by him only for domestic civilian consumption in the United States;

(iii) That, in the event of an increase in maximum prices for coffee upon the termination of this subsidy program, he will refund to the Reconstruction Finance Corporation the equivalent of such price increase (not to exceed 3 cents per pound, green basis) on all coffee which he then has in inventory on which the subsidy has been paid. For the purposes of this paragraph, the subsidy will be deemed to have

been paid on all coffee which the importer has in inventory in the United States upon the termination of this program, not to exceed the quantity on which he has received subsidy payments.

Amendment 3 to Directive 87 (11 F. R. 5023-5024):

1. (f) (iii) That, in the event of an increase in maximum prices for coffee upon the termination of this subsidy program, he will refund to the Reconstruction Finance Corporation the equivalent of such price increases (not to exceed 3 cents per pound, green basis) on all coffee which he then has in inventory on which the subsidy has been paid. For the purposes of this paragraph, the subsidy will be deemed to have been paid on all coffee which the importer has in inventory in the United States upon the termination of this program, and on all coffee loaded on board an exporting carrier for shipment to a United States port, for the account of the importer, on or before June 30, 1946, not to exceed the quantity on which he has received subsidy payments.

U. S. GOVERNMENT PRINTING OFFICE: 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent

DUNCAN COFFEE COMPANY'S PETITION FOR REHEARING OF ITS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Duncan Coffee Company respectfully files this petition for rehearing of its petition for writ of certiorari to the United States Emergency Court of Appeals, which petition was denied on May 1, 1950, under Rule 33, paragraph 2, as amended October 13, 1947.

Substantial Grounds Available to Petitioner Although Not Previously Presented

The interpretation of the contract amendment in question, so as to take and deprive petitioner of the value of 3¢ for each pound of his roaster inventory as such, as was done by the respondent, is contrary to those sections of Amendment 5 to the Constitution of the United States which forbids depriving petitioner of his property without due process of law, and which forbids taking of petitioner's private property for public use without just compensation, for the following reasons:

(a) In the light of the uncontradicted and undisputed evidence (R. 134 to 137 inc., R. 4 to 17 inc., Br. 37 to 44 inc., and Br. 44 to 58 inc.), and of the dominant importing nature of the program and contract, and of the Emergency Price Control Act the language of the amendment in question was not sufficiently clear to overcome the constitutional requirement or to comply therewith, so as to work a forfeiture or to authorize the taking of some $79,000.00 from the value of petitioner's lawful roaster coffee as such.

(b) In the light of the traditional known industry distinction between the importer functions as such and the roaster functions as such and in the light of the requirement of law that this subsidy must be a production (importer) subsidy in order to be valid, the language of the contract amendment in question was not sufficiently clear to comply with the said constitutional requirement so as to authorize unreasonable discrimination against petitioner as a competitive coffee roaster as distinguished from its functions as an importer, or so as to authorize the establishment of unreasonable classification of petitioner within the coffee industry as a condition precedent to its continued lawful performance of both its importer functions as such and its roaster functions as such equally with all others or so as to subject petitioner's lawful roaster

functions and coffee to the peril of substantial competitive dissimilarity and discrimination, under the guise of alleged mutual agreement not characteristic of the industry and not expressly provided for by the language of the amendment in question with the same clarity as the language used in the original contract prior to its amendment in respect of petitioner's importer functions as such.

(c) The language of the contract amendment in question was not sufficiently clear, unequivocal and plain to comply with the said constitutional requirements so as to authorize respondent to disregard the established and competitive industry practices and equality of the roaster as such whether integrated or not, and so as to lawfully authorize the respondent to substantially and unreasonably discriminate against coffee roasters as such whose functions are admitted by respondent to be competitive and identical.

Statement and Summary

For the guidance of all coffee roasters as such, in their dealings with governmental agencies under similar circumstances or involving either regulations as such or agreements as such, it is important to clearly and definitely decide the question as to whether, under a single federal law arising from unusual conditions and authorizing a federal agency to issue regulations and also to make agreements for production subsidy purposes, the language of a regulation shall be interpreted so as to avoid unreasonable discrimination, depriving petitioner of the substantial equal and competitive value of its properties, while an agreement whose terms are of lesser clarity than comparable provisions contained in such regulations and which agreement arises in the identical atmosphere of abnormal disturbance, but deals primarily with traditional industry practices and conduct, shall be interpreted so as to deprive a coffee roaster

as such of the value of his lawful conduct and place upon him novel, substantial and unequal competitive peril.

The opinion and the cited decisions of the court below plainly indicate that had the language of the agreement here in question been used in a regulation instead of an agreement under the identical laws, circumstances and for identical purpose, such a regulation might thereby have become invalid (R. 173). The court attempts to rationalize its holding upon the theory that somehow an agreement as such under authority of identical law and for identical or similar purposes would make a difference in the significance of the language because of the legal aspect of a "mutual agreement", rather than the legal effect of identical acquiescence, acceptance, performance, conduct and reliance upon identical provisions, terms, language and conditions of a so-called "regulation" or "order". In truth the only actual difference is that, agreement is signed by the parties while a regulation was not customarily signed. But there was nothing to prevent even a regulation from being signed if desired, and if it were so signed the fact of signing would not necessarily change its effect in anywise.

Such statement in the opinion of the court, is the practical equivalent of pointing out that the effect of the particular language of itself, is in reality ambiguous and not clear or certain sufficiently to support the peril, forfeiture discrimination and privation complained of. The court does not attempt to find or point out any variation in context or purpose or origin between the identical language referred to when used in an agreement and when used in a regulation.

The lower court cannot and does not distinguish between the purpose or origin of a regulation and this agreement, each employing the identical language. If it were able to do so, it is most probable that by so doing it would thereby defeat its jurisdiction, since its jurisdiction, such regula-

tions and this agreement all arise from the identical source, premise, purpose and atmosphere of the unusual, rather than the usual. On the contrary, the court plainly and necessarily means that its interpretation of identical language when used in the identical context, purpose and intent of the identical legislative premise, depends wholly upon the mere choice of the nomenclature by which the particular vehicle containing such language may be called. This is confirmed by the sense of its own prior decisions cited in its opinion.

The plain sense of such reasoning is that, if identical language had been employed in a document called a regulation, of identical origin and purport instead of in a document called an agreement, such language would have rendered invalid the particular imposition as complained of in this transaction. This is necessarily true, because it is obvious that there is only one legislative premise and purpose out of which production subsidy can arise, and such premise makes no distinction between the effect, purpose or significance thereunder of either a regulation, agreement or an "order", regardless of the particular transaction undertaken by virtue of authority so arising. How therefore, can the lower court justify such a distinction when actually none is made by the sole authority of law upon which its own jurisdiction, and such regulations, agreements and orders alike must depend for validity?

If in such premises, there is in fact any distinction discernable between a regulation as such and this agreement or respondent's "order" amounting to its own unusual interpretation so as to include peril in the agreement which would not attach to such a regulation of identical purport and language, then it is logical to prescribe a lesser dignity and a more harmonious and consistent interpretation in keeping with the coffee roaster's traditional competitive

equality as such, to the agreement rather than the regulation arising from identical legislative premise which premise makes absolutely no distinction between such a regulation, agreement or "order".

By merely calling this transaction one of regulation, or contract, or agreement or order does not change the terms, intent, purposes or limitations of the authority from which the transaction arises. Nor would such mere nomenclature eliminate the extraordinary atmosphere of disturbance giving rise to the enactment of this authority—the restoration and stabilizing of traditional production and distribution being the essential element of such authority, as it was designed to support the traditional equality of a competitive economy.

The coffee roaster as such could naturally be expected to understand his competitive, economic equality and the constitutional protection of his identical values arising therefrom. It would be unnatural that his competitive, economic equality as proved by admissions and uncontradicted facts in evidence, and the constitutional protection against unreasonable discrimination, and of his property and values arising therefrom, are denied him in the case of an agreement but not denied him in the case of a regulation, when both arise and purport identically.

The ultimate and crucial fact is that, in the common and identical atmosphere attending regulations as such of this nature and this subsidy agreement, both alike arising from and subject to the identical sanction of specific legislation and intent, there is neither theoretical nor practical nor realistic difference in the force or the effect of one which does not likewise attend the other. While the agreement as such has been generally referred to as a contract, it is obvious that this is a mere choice of words, as between agreement, contract, regulation or the alleged "order",

which after all is not an "order" in ordinary sense but is a mere ministerial act of interpretation.

The lower court's amazing distincton between the interpretation and effect of this agreement as such and a regulation of like origin and attributes, to be expected by the coffee roaster's industry as such, is grossly discordant with the admitted industry tradition, with the constitutional prohibition of Amendment 5 and its own prior cited decisions upon the government's effort to fix similar peril under similar language in kindred regulations.

Its opinion effectively approves the fact of substantial unauthorized taking of petitioner's property, new irreparable and novel economic and competitive discrimination and inequality. Moreover, it subjects the coffee industry to peril of interpretation not visited upon others operating under and subject to identical legislation and economic premises.

Conclusion

Permission of this Honorable Court will be sought by the Honorable Wright Patman to file amicus curiae brief. Such brief when filed will be and is hereby adopted by this petitioner and accordingly consented to.

Wherefore, petitioner respectfully prays that this petition for rehearing of its petition for writ of certiorari to the United States Emergency Court of Appeals be accordingly granted.

SAMUEL H. PEAK,
Attorney of Record for Duncan Coffee Company, petitioner, Post Office Box 2079, Houston 1, Texas.

I, Samuel H. Peak, attorney of record for Duncan Coffee Company, petitioner, do hereby certify that the foregoing

petition is presented in good faith and not for delay, and that the petition is restricted to the grounds as appears in this petition for rehearing and as designated "Substantial Grounds Available to Petitioner Although Not Previously Presented" therein.

SAMUEL H. PEAK,
Attorney of Record for Duncan Coffee Company, petitioner, Post Office Box 2079, Houston 1, Texas.

(8246)

MOTION FILED MAY 16 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING THE PETITION FOR REHEARING, AND BRIEF.

WRIGHT PATMAN, *amicus curiae,*
1203 House Office Building,
Washington, D. C.

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SUPREME COURT OF THE UNITED STATES

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No. 542

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Petitioner,

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RECONSTRUCTION FINANCE CORPORATION,

Respondent

Now comes Wright Patman and respectfully requests leave of the Court to file the attached brief as amicus curiae in support of the petition for rehearing. Counsel for the petitioner have consented to the filing of this brief, but counsel for the respondent have declined to consent to such filing.

Respectfully submitted,

WRIGHT PATMAN, *amicus curiae,*
1203 House Office Building,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent

AMICUS CURIAE, BRIEF SUPPORTING THE PETITION FOR REHEARING, WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

Opinion

The opinion of the lower court is reported at 178 F. 2d 926.

Jurisdiction

Jurisdiction arises from Section 204 (d) of the Emergency Price Control Act of 1942 as amended. 50 U. S. C. A. App. 924 (d).

Question Presented

Whether the respondent's interpretation of the coffee import subsidy agreement so as to deprive petitioner of 3¢ per pound of the value of its coffee lawfully acquired

equally and alike with all roasters as such, is lawful, constitutional and plainly required by the language of said import subsidy agreement.

Statute Involved

Emergency Price Control Act of 1942 as amended (U. S. C. A. App. 901 et seq., 56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664).

Statement of Nature and Results of the Case

This case concerns a transaction between the respondent government agency and petitioner a coffee roaster and also a coffee importer, arising under the authority of the Emergency Price Control Act of 1942 as amended (R. 167). This legislation was enacted during and for the purpose of overcoming, the greatly disturbed unprecedented economic conditions in the nation. It provided for the payment of certain subsidies for the purpose of encouraging the production of various commodities, one of them being coffee, and quite naturally the agreement and provisions for the coffee import subsidy was made with the importers who were established in the performance of the coffee importing functions, as it was an underlying purpose of this legislation to restore and stabilize the normal economy.

The Department of Agriculture had issued quotas to such importers, and thusly the subsidy agreement identified the functions of importing and the identity of the importer who because of such functions was thereby qualified as an importer to receive such subsidies. Under the subsidy arrangement the importers received 3¢ per pound on coffee which they imported. They paid out this 3¢ per pound to the coffee growers in the foreign countries, for no coffee is grown in the United States.

The coffee industry in the United States traditionally includes enterprises or business concerns who confine their functions to that of importing exclusively, and others who perform only the functions of a coffee roaster (processor) exclusively, and still others who perform under integrated management the functions of the importer as such, and also the functions of the roaster as such. But the subsidy arrangement, agreement and program was in all essentials in the same language, terms, tenor and conditions, with all importers equally and alike as such, without mention or regard to whether the particular importer did or did not perform any functions of the roaster or processor.

This subsidy arrangement or agreement therefore, is not complained of in anywise as it respects or provides for repayment to respondent arising from petitioners having exercised the importer functions thereunder, for the classification, provisions, application and effect thereof, were in every sense plain, clear, equal and alike upon all importer functions, without regard to any processor (roaster) functions that may or may not have been also exercised.

The controversy involves the question of whether the subsidy arrangement or agreement intended and clearly and lawfully provided that the continued exercise of the processor (roaster) functions of the industry were thereby to become subject to peril of payment to the government when the processor functions were performed during the time covered by the agreement by those who were also qualified importers as such, including petitioner. The agreement was amended March 19, 1946 and May 7, 1946 after having been originally made on November 19, 1945. It is from these amendments, more especially the latter, that the controversy arises. No element of payment by the importer to the government was in anywise mentioned or provided for by the terms of the original agreement.

The only basis claimed for such withholding is respondent's contention that the language of the import subsidy agreement plainly imperils the continuation of such roaster practices of acquiring coffee from importers who had imported it, to the extent of 3¢ per pound on all such coffee on hand at the end of the import subsidy period.

Processors (roasters) whose functions were traditionally confined to acquiring coffee from importers who had imported it into the United States were not concerned with the subsidy agreement, since they could not qualify thereunder as they had no import quota assigned by the Department of Agriculture. Not having historically performed the functions of importing they did not have import quotas. There were more than 1,000 roasters as such in the United States. There were 312 importers as such, who participated in the import subsidy program. Therefore, there were at least 688 roasters who exercised no import function, and the business of all roasters alike is highly competitive. Petitioner's roaster coffee and substantial quantities of coffee in the hands of all roasters at all pertinent times, were economically identical and subject to identical government controls upon all roasters alike (Petitioner's Br. 40, 41, 43).

Argument

This transaction cannot be fairly interpreted as if it were concerned with a commercial trade contract. This Court will take notice that it is not determining such a transaction but one arising in the atmosphere of disturbed, unprecedented, unusual conditions in which both the supporting legislation and the transaction itself were conceived. It is natural to expect this Court to view this transaction in the total unprecedented environment out of which it arose and in which it was performed. It seems of course, that the lower court stopped somewhat short of this full duty, and

instead, adopted a theory so highly refined as to lead to the reasonable conclusion that from some undisclosed source this import subsidy was actually intended to add a further and entirely new doctrine of peril to the already disturbed economy of the very essential competitive coffee roaster functions as such.

Nothing could be farther from the true situation. This record discloses without contradition (and it was public knowledge), that without the coffee roaster functions as such, protected not only by our national economic traditions and philosophy but by our jurisprudence as well, in the fair, equal and identical known industry practices of buying the coffee as did this petitioner, from the importer who had imported it, there would be no normal distribution (Petitioner's Br. 37(5), 39(13), 40(21), 42(29-31).) Any interference to retard or imperil the fair, equal and competitive continuation of this roaster function to any extent correspondingly adds further disturbance and confusion to the very conditions which this program sought to remedy.

If it had been intended to single out a particular class of roasters as such and to visit peril upon their continued competitive roaster functions for the duration of this agreement, there would necessarily have to be some reasonable basis for such classificattion in order to justify the departure from the standard of equal treatment for all competitively situated. Moreover, such a classification would necessarily have to be plainly expressed because the Statute under which authority for classification arises is a uniform Statute making no exceptions in its application. Certainly the mere fact that some roaster functions were smaller and others were larger would not be sufficient to meet the test of reasonableness.

This legislation and this agreement were enacted to encourage the normal established and competitive economic functions and conditions. It is obvious that wherever

peril was intended to be visited upon any traditional function, it was the duty of the government draftsman to distinctly so declare such peril. It is common knowledge and notable that the government draftsman did speak with unmistakable clarity to all sizes and segments of the meat slaughtering and packing industry equally and alike in the pointing out of peril which would attach under their subsidy by virtue of the well-known "ownership and control" clause contained in the subsidy regulations on meat. That subsidy like the coffee import subsidy, was a production subsidy. It existed under the identical law, environment and for the identical purposes as did the coffee import subsidy. It was conceived out of and designed to remedy the identical conditions of unprecedented disturbance. In its purpose, intent and desired economic results it was identical with the coffee import subsidy program.

Is it not still the law that our governmental agency interpretation must be distinctly clear in its elements of forfeiture and in the taking of one citizen's money, competitive equality or his liberty under identical authority in one case as in the case of another? Is less clarity of peril and deprivation required of the government draftsman in its production subsidy transactions with respect to meat for public economic benefit and stability of established methods of distribution, than is required in transactions of identical nature and purposes under the identical authority with respect to the production subsidy of coffee?

In the situation of confusion and disturbance existing at the time, the preciseness of ultra distinction as to mechanical or ministerial method employed by the governmental agency to accomplish the government's purposes in this subsidy program is beside the point. Such microscopic distinctions between the legal effect and the presence of peril flowing from language when used in a regulation or order, and identical language when used in such agreement or contract,

ought not to distort the integrity of the government in its studied but wholly initiatory purpose to so aid and encourage the functions of the coffee importer as such. If it was intended that the functions and inventory of the coffee roaster as such, were to become subject to the competitive peril, discrimination and loss that has actually resulted in this roaster's case, then it was surely the sovereign's duty to point out such intent in the same unmistakable language as it had done in the identical atmosphere by clearly so specifying in respect of the relations between the slaughterer and a purveyor of meats.

A brief comparison of the coffee subsidy and of the meat subsidy will illustrate the government's duty in this environment to point with clarity to the intended peril. Both subsidy programs are of a production nature and arise from identical authority and are of identical substantive purpose and effect (Section 2(e) Emergency Price Control Act of 1942 as amended, 50 U.S.C. App. 902 (e)).

The government paid the subsidy to nonprocessing meat slaughterers knowing they were compelled to pass it along to the farmer in the purchase price paid him for his cattle, just as the subsidy was paid to the coffee importer as such, knowing he would have to pass it along to the grower in the foreign country.

The government notified the slaughterers that if they were affiliated with a processor (accomplished by clear definitions) the slaughterer's subsidy would thereby become imperiled. With exceeding clarity the government drew the distinction between the functions which were imperiled and those to which no peril was intended.

In the coffee import subsidy the alleged clarity by which this peril was *visited upon the functions of the roaster as such* and which peril was was intended (alleged) *to flow from the performance of the importer functions*, was not

mentioned or otherwise pointed out with any similarity to the careful draftsmanship above mentioned. In fact, the lower court was rather abrupt in its treatment of the continued unchanged employment of and reference to the phrase "the importer" as it consistently appeared in this coffee import subsidy from the beginning to the end. It is not expected that this Honorable Court would be inclined to look upon the continued, repeated and consistent usage of identical language from beginning to the end of this transaction, as being sufficient to establish equal clarity with the language used to point out peril in respect of subsidy to the meat slaughterers. (Fox Packing Company vs. Fleming, 161 F. 2d 209 (211).)

The lower court appears to feel that the importing functions exercised by the Duncan Coffee Company is dominant in its economic existence. It states that ". . . some such importers . . . of which the Duncan Coffee Company was one purchased part of their green coffee supplies from other importers". The implication of the choice of words made by that lower court would seem to indicate that it considered the acquisition of coffees by the petitioner from other importers to constitute a function of the importer as such. Not only is such a result not true, but it is contrary to all the evidence. When the petitioner acquired coffee from domestic suppliers who had imported it, it was performing the function of roaster as such, in all respects economically identical with such roaster functions as were engaged in traditionally by all roasters equally and alike, in precisely the identical circumstances and atmosphere of disturbed economic conditions as the Booth Fisheries Corporation engaged in the function from which the identical court relieved it of peril (153 F. 2d 449), and in the identical sense, economic purpose and effect as the court relieved of peril in the case of the Electromatic Distributors vs. Clark

(162 F. 2d 212). However, the lower court appears to be unduly impressed with the fineness of distinction between identical language when used in the regulation arising under this law and identical environment and when used in the particular agreement at bar arising under the identical law and in the identical environment.

The lower court's impression might well arise from its apparent inclination to confine its determination wholly to the language of the amendments themselves. It emphasizes the first amendment and minimizes the second and final amendment and it apparently in its reasoning actually substituted "Duncan Coffee Company" for "the importer", and ". . . engaged in the importation of coffee" (R. 41), not only in the controversial paragraph 14 as amended but in the entire agreement as well.

It overlooks respondent's admitted prior knowledge of the dual functional characteristics prevailing in the industry and of the economic competitive equality between each of those *functional* characteristics. It passes lightly over the importer *functional classification* dignified by *license in recognition thereof*, which had to be issued by the government and *which could not be conferred upon the roaster functions*, for the simple reason that such functions did not include the functions of the importer as intended by and expressly referred to in the third unnumbered paragraph of the agreement as it appears on page 41 of the printed record. It passes lightly over the innumerable and frequent usage of the identical language including subparagraph 8a (R. 44). It is noted that, in this connection and in this identical environment the government through its recognized agency issued War Food Order 146 (11 F.R. 3785), the effect of which specifically recognized the distinction between the importer *function* as such and the roaster *function* as such, in respect of the quantities of inventory which each were

permitted to have on hand at any time, without regard to whether each or either of such *functional* statuses might or might not be integrated with any other *function*. Therefore, it cannot be denied that no advantage or benefit could accrue to this petitioner's *roaster functions* or activities by virtue of petitioner's importer functions or activities, which advantage did not likewise, equally and alike accrue to every other roaster in the land, whether affiliated or integrated or not.

The lower court hastily passed over the detailed treatment and requirements of the agreement in respect of each step of the *functional* performance of the importer's characteristic *activities as such* thereunder, notwithstanding that *nowhere in the agreement is any functional activity of the roaster as such either described, mentioned or alluded to.*

The lower court appears to be impressed with what it considers as an advantage accruing to the petitioner by reason of the increase in the quantities which it was authorized *to import*. It overlooks the obvious fact that such increase could be of no individual advantage to the petitioner in the amount or quantity of inventory it was permitted to hold at any time, without running afoul of War Food Order 146. It overlooks entirely the fact that similar increases were applicable to all importers as such equally and alike, since the program was not peculiar to the petitioner alone. In truth, the lower court appears to be overly impressed with the idea of a single contractual premise and strictest concepts thereof as in the case of a single contract in the nature of a private commercial undertaking and in such an environment. It rewrote *not only* the agreement, but its entire setting as well, and not in the interest of the objective result intended by the law authorizing all production subsidies, not in the interest of fair treatment of the roaster function,—but wholly in the interest of harsh, unwholesome

advantage to the government and it did so by providing an entirely new setting totally different from that which existed in fact.

It appears that the lower court considered that this agreement conferred a private commercial advantage or some other competitive private benefit upon the importer which reacted to his advantage in respect of his competitive roaster functions. This theme prevails throughout the lower court's opinion. Such a conclusion or impression is contrary to common knowledge of economic reality and truth, and is grossly inaccurate in view of the existing controls which applied to the quantity of coffee and the price thereof in this roaster's operations equally, identical and alike with at least 688 other competitive roasters who had acquired free of prejudice, substantial inventories of identical coffee, for identical purpose, from identical sources and in the exercise of identical roaster functions and traditions. The truth about the matter is simply that by exercising the importer function the petitioner like all other importers equally and alike, merely "produced" more coffee into the United States which the government under its inventory control and its pricing control, orders and regulations, made equally as available to one roaster as another regardless of integration of the roaster function and the importer function. The lower court in this case has obviously lost "the common touch".

The second amendment to this agreement appeared on May 7, 1946 and is the particular amendment out of which arise the questions involved. The pertinent part thereof reads as follows:

> "in the event of an increase in or removal of OPA maximum prices on coffee, *the importer* shall pay to RFC an amount equal to the equivalent of the increase in value of his inventory, computed as follows:

"(a). The rate shall be 3¢ per pound green basis, or the increase in OPA maximum prices, whichever is larger.

"(b). The inventory shall include all types of coffee, measured in green basis equivalents, at the close of business on the day prior to such increase in or removal of maximum prices, which either *the importer* owns in the continental United States or for which a bill of lading covering shipment to the United States for *the importer's account* has been issued in a foreign port; provided that the total inventory shall be reduced by the quantity of such coffee which the importer has contracted to sell at a fixed price not to exceed the OPA maximum prices for coffee in effect April 1, 1946.

"(c). The total amount of repayment to RFC under this paragraph shall not exceed the amount of payments by RFC *to the importer* under this agreement as amended." (Emphasis ours).

After having used the phrase "the importer" throughout this production subsidy agreement in its functional sense and purpose as the law made necessary to its validity (producing-importation into the United States from foreign countries), the plainest sense of the amendment simply stated is, the same importer functional identity as such (R. 41), as is engaged in the importation of coffee into the United States in the exercise of the governmental quota permitting the exercise of that function, shall pay 3¢ per pound on coffee in the hands of such functional identity whether the coffee was in the United States, or a foreign port. Certainly it would have been proper also to set out that a roaster function acquiring coffee from importers after it has been imported, shall also pay 3¢ per pound when the roaster function is integrated with or controlled by the management of an importer function, if that had been intended.

It must be remembered that this paragraph and this amendment are not isolated or complete transactions within

themselves and they do not appear in an environment of orderliness or stability. They relate to the original agreement as well as the underlying legislation and its objective, purposes and the conditions then existing which prompted such enactment. This agreement, including the amendment, is in fact the hand of government laid upon the established importing functional resources and activities of an established industry, for government's unusual purposes. Added peril or control of the roaster function was not needed because the roaster quantities and prices were already controlled and regulated in all things equally and alike. Therefore, if it was intended plainly to add still another peril or control to some roaster functions only when exercised by a particular one or more roasters and not upon all roasters as such equally and alike—and to the point of giving some a 3¢ per pound advantage over others, it is government's duty to do so with far greater clarity than innuendo or inference.

Does the phrase "the importer" as used in only one place ("the importer owns in the continental United States * * *") have a sufficiently different meaning to fix an entirely new peril on a traditional activity that involves *no importing functions?* Does it plainly have a meaning grossly different to that of the identical phrase further along in the same sentence ("* * * covering shipment to the United States for the importer's account * * *"), or a meaning when used at this one single point so grossly different from that clearly intended by the numerous uses of the identical phrase throughout the agreement?

Of course, respondent's acrobatic efforts to impart plain notice of peril to the roaster functions, by the language of subparagraph c, is refreshing but very like pointing to the haystack which could contain the needle. Moreover, it is equally logical if not more so, for such language to mean

that the importer shall not be required to pay in excess, if he shall have been penalized by some violation, as is pointed out in petitioner's brief at page 35. Your *amicus curiae* respectfully submits that government draftsmanship imposing peril, discrimination and forfeiture of the nature here concerned should be held to the duty of such express clarity that its interpretation can safely be determined by hornbook and that such is assuredly not the case here if respondent's interpretation is to prevail.

In this situation, the unassailable truth is, this roaster function has suffered discrimination and a loss and a taking by the government contrary to the Fifth Amendment of the Constitution, of 3¢ per pound which was obviously and notoriously not suffered by at least 688 others economically, identically and competitively situated—and this was done with no compensation or possible lawful chance of recovery—if this Honorable Court proposes to disregard all evidence and common knowledge and to hold that the coffee roasting business is not highly competitive. Your *amicus curiae* is confident that the fact of such loss to this roaster's competitive functions and property value and the sizable burden of discrimination visited upon this roaster, cannot be factually successfully denied.

The admitted and the uncontradicted evidence (petitioner's brief 37 to 58 inc.) clearly shows that this roaster as such was beyond a doubt, economically and competitively identical with all roasters, and that situation in the face of the commonly known facts that none of such competitive roasters on their substantial quantities of coffee obtained from identical sources of supply under identical conditions and for identical purposes, suffered any such loss or taking or discrimination, makes the respondent's interpretation repugnant to the realistic appreciation of equality and fair competition in our economy.

It is compelling that this entire undertaking of the coffee import subsidy program and this agreement was of an importing nature and none other. There is no more clearly stated purpose in this agreement to follow the coffee from the importer who imported it to this roaster or to any other competitive roaster for the purpose of so-called recapture after this roaster had lawfully purchased it from the importer, than it was clearly provided that the same coffee should be followed for recapture into the hands of the grocer or even the consumer. The very purpose of this recapture forces the importer to sell—and who will he sell to but the roaster—all roasters as such, equally and alike.

Aside from the disturbed conditions at the time and the law's purpose to restore and stabilize normal distribution and economy—competition, under the plain sense of paragraph 8b of the agreement (R. 44), it was expected that importers as such would sell to roasters as such equally and alike and that roasters as such, all roasters, would buy equally and alike from importers, as had been established traditionally in this industry. The lower court overlooked these economic invariables, which are neither cloistered nor secluded.

Where is the language in this agreement clearly notifying this roaster as such, that it will become necessary for him to reduce or cease making purchases in the traditional roaster industry practice from the importer—except at his competitive peril, while at least 688 competitors could continue to enjoy the protection of War Food Order 146 from which he would thereby be effectively excluded, even though he was economically dependent upon his sales, like his competitors, of roasted coffee? Does the Court propose to disregard the known facts and the evidence in its entirety—and proceed solely upon a distorted theory alone?

In reality this coffee import subsidy agreement, instead

of being contractual in the usual and strictest sense is actually more in the nature of a joint initiatory venture by the government by its use of the industry importing functional establishment, but essentially in the public interest as distinguished from the immediate competitive advantage profit of the individual importer. No importer as such, and no roaster could have any inventory quantity advantage as long as War Food Order 146 was needed—and it remained throughout this venture.

Conclusion

In the environment of the unprecedented conditions giving rise to this importer production subsidy agreement (or distinguished from a roaster functional control measure), and to all such subsidies of similar nature, and to the extraordinary legislation and philosophy authorizing them, whether regulation, agreement, contract or order, it may well be considered a step significantly contrasting to the harmonious and constructive relations between government and the productive competitive economy upon which our private enterprise system depends, if this Honorable Court permits this assuredly truculent and abortive interpretation of the respondent to stand.

Your *amicus curiae* feels it necessary and proper to respectfully make clear the fact that he neither has nor will accept any pecuniary interest or any other profit, gain or benefit of any nature or extent whatsoever, directly or indirectly related to or arising from this case or the private enterprise concerned. His labor and careful study of this case is and has been solely in the public interest and the personal belief that it is his honorable duty to express as *amicus curiae* his sincerest and considered convictions before this Honorable Court according to the privilege granted him.

Prayer

WHEREFORE, your *amicus curiae* respectfully prays that the petition for rehearing and the writ of certiorari as prayed be granted.

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